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DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING THE DECISIONS HANDED DOWN JUNE 20TH, 1872,
TO AND INCLUDING A PORTION OF THE DECISIONS OF
JANUARY 21ST, 1873,

WITH

NOTES, REFERENCES AND INDEX.

BY H. E. SICKELS,
COUNSELOR-AT-LAW.

VOL. V.

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RUFUS W. PECKHAM,
MARTIN GROVER,
CHARLES J. FOLGER,
CHARLES A. RAPALLO,
CHARLES ANDREWS,

Associate Judges.

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ERRATA.

In case of *Westfall* v. *Preston* (49 N. Y.), erase "affirmed" in last line of page 355, and insert "reversed." In *Oneida Nat. Bank* v. *Stokes* (in Memoranda of 49 N. Y., p. 675), the judgment should read, "judgment modified, and affirmed as modified, without costs to either party."

CASES DECIDED

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

COMMENCING JUNE 20th, 1872.

AARON A. DEGRAW, Respondent, *v.* JAMES H. ELMORE, Appellant.

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Plaintiff's complaint alleged in substance that he was induced by fraudulent representations on the part of defendant to purchase and pay for certain stocks; that upon discovery of the fraud, he elected to rescind the contract, tendering back the stocks purchased, and demanded the money paid therefor, which defendant refused to pay, etc. He claimed to recover the alleged purchase-money paid. Upon the trial it appeared that plaintiff paid no money for the stocks, but only credited defendant the amount of the purchase-price upon a prior indebtedness. *Held* (PECKHAM, J., dissenting), that the rescinding the contract restored plaintiff to his original right as to the prior indebtedness and made the credit a nullity; that the credit could not be regarded for the purposes of the action as so much money paid, and thus a judgment be recovered which could be enforced by imprisonment, and that plaintiff was not entitled to recover;

The Code does not authorize a recovery where the complaint alleges facts showing a cause of action in tort by proving upon the trial a cause of action in contract.

(Argued May 29, 1872; decided June 20, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff entered upon a verdict.

The action was brought to recover moneys alleged to have been paid defendant upon a purchase of certain stock of the

Statement of case.

Mahony Coal Company, which purchase was induced by fraudulent representations upon the part of defendant.

The complaint set up the purchase and payment for the stock, the fraudulent representations, the tender of the stocks upon discovery of the fraud and demand of the purchase-money, and the refusal of defendant to receive back the stocks or pay back the money.

Upon the trial it appeared that nothing was in fact paid for the stock, but that plaintiff credited the amount of the purchase-price upon an account owing by defendant to him.

At the close of plaintiff's evidence, defendant's counsel moved for a nonsuit upon the ground, among others, that plaintiff parted with no value for the stock, but received it in payment of a precedent debt, and if fraud was practiced the original debt still remained and his status was not changed, which motion was denied.

The judge charged the jury, among other things, that if the defendant's representations were untrue, the plaintiff could rescind the contract and recover back the money paid by him for the stock.

The court also charged that if the defendant represented the stock he sold the plaintiff as that of another person, when in fact it was his own, the sale was a fraud upon the plaintiff, and gave him a right to rescind the contract and recover the price paid. To this the defendant excepted.

That if the defendant represented the stock which he sold the plaintiff as the stock of any other person, when in fact his own, and the plaintiff relied upon his representation, either in part or in whole, in making the purchase, then this state of facts constituted the defendant in this transaction the agent of the plaintiff. To this the defendant excepted.

The jury found a verdict for the amount of the credit given for the stock. Certain questions of evidence raised upon the trial appear in the opinion.

Samuel Hand for the appellant. The only effect of the rescission was to make the credit given for the stock a nullity.

(*Lawrence* v. *Clark*, 36 N. Y., 128.) A mere misrepresentation as to who was the owner of the stock is immaterial. (*Frost* v. *Clarkson*, 7 Cow., 25; *Horton* v. *Morgan*, 19 N. Y., 170.) The exclusion of the offered evidence as to the advice of his counsel in regard to the lease was error. (*Oberlander* v. *Speiss*, 45 N. Y., 175.)

John E. Parsons for the respondent. Where defendant transfers his own stock to plaintiff upon representations that he is buying for him of another, plaintiff can rescind. (*Conkey* v. *Bond*, 36 N. Y., 427; *N. Y. C. Ins. Co.* v. *N.P. Ins. Co.*, 14 id., 85.) Both the fraud and the fiduciary relation entitled plaintiff to rescind. (Story on Agency, § 214; *N. Y. C. Ins. Co.* v. *N. P. Ins. Co.*, 14 N. Y., 91; *Conkey* v. *Bond*, 36 id., 427; *Bennett* v. *Judson*, 21 id., 238.) A refusal dispenses with the necessity of a tender. (*Douglas* v. *Patrick*, 3 Term R., 683; *Thomas* v. *Evans*, 10 East., 101; *Slingerland* v. *Morse*, 8 Johns., 476; *Everett* v. *Saltus*, 15 Wend., 478; *Vanpell* v. *Woodward*, 2 Sandf. Ch. R., 143.)

GROVER, J. The remedy of a party claiming that a fraud has been practiced by which he has been induced to enter into a contract, is so thoroughly settled, that the mere statement is sufficient. He has his election upon the discovery of the fraud either to affirm the contract and bring an action for the recovery of the damages sustained by him, or to disaffirm the contract, restore to the other party all he had received under it, and demand and recover from him all he has parted with in pursuance of the contract. In case the latter remedy is adopted and the fraud is established, the contract is rescinded, and the rights of the parties the same as though it had never been made. If the party guilty of the fraud refuses to restore upon demand what he has received under the contract, it may be recovered of him or its value in the proper action as tortiously withheld. Upon an execution issued upon a judgment so recovered, the debtor would be liable to arrest and imprisonment in like manner as upon other judg-

ments recovered for torts. In the present case the plaintiff elected to rescind the contract. He accordingly offered to return the stock purchased to the defendant, who refused to receive it. The action was for the recovery of the money, $9,000, alleged to have been paid by the plaintiff therefor, with interest. The proof was that no money was paid by the plaintiff to the defendant for the stock, but that a credit of $9,000 therefor was given by the plaintiff to the defendant upon an account which the plaintiff had against the defendant for money paid by him for the defendant to a contractor for the construction of a certain street railroad, upon which there was a balance due from the defendant to the plaintiff of about $16,000. The court upon trial held and decided, that in case the plaintiff established his cause of action in other respects, he was entitled to recover the amount of this credit upon the account, and so charged the jury, to which an exception was taken. This was error. The contract, if rescinded, restored the plaintiff to his original right as to the account, the credit given being a nullity. That right was to recover the account in an action upon the contract. Upon the judgment so recovered the defendant could neither be arrested or imprisoned, in the absence of an order of arrest made before the recovery. The credit could not be regarded as so much money paid for the purposes of the action, and in that way a judgment recovered that could be enforced by imprisonment. It is insisted that under the Code, forms of action are abolished, and that the facts showing the right of action need only be stated. This is correct, but it does not aid the plaintiff. The facts are not stated. The plaintiff had a cause of action against the defendant upon an account for money advanced for him. Instead of stating this cause of action, the allegation is in substance that he paid him money as the price of stock fraudulently sold by the defendant to the plaintiff, which contract has been rescinded by the plaintiff, and a return of the money demanded, which has been refused by the defendant. These causes of action differ in substance

The former is upon contract, the latter in tort, and the law will not permit a recovery upon the latter by showing a right to recover upon the former. If so, we have seen that the defendant might be imprisoned where the recovery was really upon contract. It is insisted that the ruling may be sustained upon the ground that there was some proof that the plaintiff held some stock as security for the amount which he had surrendered to the defendant. There are several answers to this. First, the proof was conflicting as to whether any stock was surrendered by the plaintiff to the defendant upon this transaction. Second, there was no proof of the value of any such stock. Third, there was no proof that any such stock was demanded prior to the commencement of the action. It is further insisted that the answer admits that the plaintiff had paid the defendant for the stock in other stock. This does not aid the plaintiff. There was no proof of a demand of any stock so received or of its value. It was this stock that the plaintiff was entitled to have restored or its value, and to perfect his right he must make a demand of it. This disposes of the case, but as a retrial may be had upon an amendment of the pleadings, setting up the cause of action upon the account, which the Special Term may allow upon terms, I will add, that I think the court erred in charging the jury, in substance, that if the defendant represented to the plaintiff that he was going to purchase stock of another person and would sell the plaintiff what he wanted of it, when in fact the defendant then owned it, the fraud of the defendant was established. This testimony should have been submitted to the jury in connection with the other testimony, to enable them to determine whether the defendant was guilty of fraud in making the sale. The testimony offered, that the defendant was advised that the assignment of the lease to the company gave it a good title, should have been received upon the question whether the representation of the defendant that the company owned the property was made with intent to defraud

the plaintiff. The judgment appealed from must be reversed and a new trial ordered, costs to abide event.

PECKHAM, J. (dissenting). As to the main ground of reversal, there is no such point taken at the trial. There is not an intimation, from the beginning of the trial to the end, that there was any defect in the complaint, or that the wrong action was brought; not a word that the action should have been for the original demand due the plaintiff, in payment whereof the stock was taken. The point, as argued on the motion for a nonsuit, was that no fraud had been committed, because the plaintiff had parted with nothing; therefore the defendant was guilty of no fraud.

But the point was never presented to the mind of the judge at the trial that the action should have been upon the original debt. I am opposed to raising it here. Because:

First. The merits of the cause have been fully tried, without surprise to either party. No matter what the form of pleadings, the trial must always involve the same question of fraud in the sale of the stock to plaintiff.

If the complaint be simply for the original money due to plaintiff, the defendant sets up payment by this stock, and then the question arises on the trial whether the sale was fair or fraudulent. It is the only question in dispute, and that question has been fairly tried. The only benefit that could arise by the proposed amendment of the complaint, would be to have pleadings that should conceal the real matter in dispute.

Second. The complaint is sufficient as it is. It is within the plain meaning and spirit of the Code. It "contains a statement of the facts constituting the cause of action in ordinary language, in such manner as to enable a person of common understanding to know what is intended." (Code, § 141.)

The only objection is, that it alleges that the plaintiff paid

the money for the stock, when in fact, the stock was received by plaintiff in payment of $9,000, money defendant confessedly owed plaintiff, a mistake in stating the precise consideration. The defendant understood the complaint; no pretence that he was misled by it.

This variance, between the pleading and the proof, the court had full authority to amend or to disregard under the Code.

This question of pleading has been a terror to suitors for many years before the Code. Legislatures have sought in vain to give relief, and now if this decision be sustained, I think our movement is backward much more than half a century.

England was our original, but she is far more liberal in disregarding variances in pleadings, both civil and criminal, than we are.

By our Code we have fully repudiated the practice of special pleading, and this decision seems to hold that we shall not have the benefit of the Code.

Probably in not one case in ten thousand has injustice been done from the ignorance of a suitor as to the matters to be tried.

But the cases of loss and damage to suitors by some defect of pleading have been innumerable.

There is no difficulty as to the question of imprisonment, as this court has recently held. The point was not raised or discussed by counsel, and I shall not review it. But clearly if the amendment be made in the complaint according to the proof, the defendant will not be imprisoned unless the law justifies it.

All concur, except PECKHAM, J., dissenting.

Judgment reversed.

Statement of case.

EMILY W. BRACKETT, Appellant, *v.* ARTEMUS BAUM, Respondent.

A statutory foreclosure and sale under a power of sale contained in a purchase-money mortgage, bars the right of dower of the wife of the mortgagor, who was not a party to the mortgage.

Although she does not derive title from her husband, yet she claims under him within the intent of the provisions of the Revised Statutes regulating mortgage sales under powers. (2 R. S., 745, § 8, as amended by the act of 1840, § 12, chap. 342, Laws of 1840.) It is only by virtue of his seizin that she can claim, and her inchoate right is subject to any claim to which the title he acquired was subject. It is subordinate to a purchase-money mortgage, and subsequent to it in the order of priority; and where it ripens into an actual title, upon the death of her husband, it is subsequent in point of time.

(Submitted June 6th, 1872; decided June 20th, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial district in favor of defendant, entered upon a case submitted under section 372 of the Code.

Plaintiff, as the widow of Oscar B. Brackett, claims dower in certain lands situated in Clay, Onondaga county, purchased by him of Cyril N. Brackett on the 9th of November, 1835. He took a conveyance of the lands on that day, and at the same time gave back a bond and mortgage on the premises for the purchase-money or a part thereof. This was during the coverture.

The mortgage was assigned to one Colvin, who for default of payment foreclosed by advertisement under the statute, and on the sale which took place June 20, 1860, he became the purchaser. Oscar B. Brackett died afterward in the year 1867. The defendant is in possession, claiming title under that mortgage sale. Plaintiff was not a party to the mortgage. She claims dower on the equitable terms of contributing to the payment of the mortgage after an equitable accounting of the rents and profits.

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The Supreme Court decided adversely to the claim for dower, and judgment was entered accordingly.

George F. Comstock for the appellant. A mortgage is a mere security, the title and seizin remains in the mortgagor. (2 Burrows, 978; Doug., 632; 1 East., 288; 6 Cow., 159.) Even where mortgagee has possession, such possession is but an incident and part of the security. (*Kortright* v. *Cady*, 21 N. Y., 364, 365; 6 Conn., 163; *Mills* v. *Van Voorhis*, 20 id., 412; 3 Johns. Cases, 329; 1 Johns. R., 590; 7 id., 278; 4 id., 42; 15 id., 319; 6 id., 290; 2 Paige, 68, 586; 5 Wend., 602; 2 Barb. Ch., 119; 11 Johns., 534; 4 Kent's Com., 11th ed., 169, note; 4 id., 214, note.) In case of mortgage for purchase-money given during coverture, in which the wife does not join, she is entitled to dower against all persons but the mortgagee. (12 S., 740, § 4; *Mills* v. *Van Voorhis*, 28 N. Y., 412; id., 23 Barb., 125; *Wheeler* v. *Morris*, 2 Bosw., 524.) The right of dower exists in subordination to the mortgage, and is to be asserted in equity upon the terms of redeeming or paying the debt. (*Hitchcock* v. *Harrington*, 6 Johns., 290; *Collins* v. *Terry*, 7 Johns., 278; *Van Tyne* v. *Thayer*, 14 Wend., 233; id., 19 Wend., 162; *Gibson* v. *Crehore*, 3 Pick., 475; *Same*, 5 id., 146; *Smith* v. *Eustes*, 7 Greenl., 41, 43; *Bell* v. *Mayor*, *etc.*, 10 Paige, 49; *Denton* v. *Nanny*, 8 Barb., 618; *Kittle* v. *Van Dyke*, 1 Sand. Ch., 76.) Plaintiff is not bound by the statute of foreclosure. (1 R. S., 740, § 16; 2 id., 545, 546, § 8.) A foreclosure and sale by suit in equity, does not bar the wife unless she is made a party. (*Mills* v. *Van Voorhis*, 20 N. Y., 412; id., 23 Barb., 125; *Wheeler* v. *Morris*, 2 Bosw., 524; *Denton* v. *Nanny*, 8 Barb., 618.) Plaintiff does not claim under her husband or have title subsequent. Her right is entirely independent and depends upon statute. (*Wilkinson* v. *Parish*, 3 Paige, 657; Parke on Dower, 132, 157, 158, 160; 2 P. Williams, 634; 2 Eq. Cas. Ab., 382; *Derecsk* v. *Brown*, 8 Ham., 412.) The claim which is barred must be, by title, the wife's dower right, until the death of the husband, is not an interest in

lands. (*Moore* v. *Mayor, etc.*, 8 N. Y., 110; *Ritchie* v. *Putnam*, 13 Wend., 524; *Lawrence* v. *Miller*, 2 Comst., 245; id., 254; *Gooch* v. *Atkins*, 14 Mass., 378.)

D. Pratt for the respondent. The requirements of the statute were all observed. (2 R. S., 2d ed., 450.) Plaintiff's inchoate right of dower was extinguished by the foreclosure and sale. (Laws of N. Y., 1840, p. 290, § 8; 2 R. S., 2d ed., 733, § 5.) A foreclosure by advertisement is as effectual as a foreclosure in equity to extinguish interests and claims accruing subsequent to the mortgage. (*Stowe* v. *Tefft*, 15 J. R., 458; *Demorest* v. *Wynkoop*, 3 J. Ch., 129.)

RAPALLO, J. Prior to the sale under the mortgages, described in the case, Oscar B. Brackett was seized of the mortgaged premises, subject to such mortgages; and his wife, the appellant, had an inchoate right of dower therein, except as against the mortgagees and those claiming under them. The mortgages having been given for purchase-money of the land, this right of dower of Mrs. Brackett was subject to them, although she was not a party thereto. (1 R. S., 740, § 5.) The only question which requires examination is whether this right of dower was barred by the statutory foreclosure and sale under the power contained in the mortgages, so that the purchasers took a title free from such dower right.

The only statutory provision expressly referring to the wife's dower, in case of a sale under a power contained in a purchase-money mortgage, is to be found in section 6 of 1 R. S., 741, which enacts that in case of such a mortgage, if, after the death of the husband, the mortgagee sells, either under a decree in equity or under a power of sale contained in the mortgage, and there is a surplus, the widow shall be entitled to the income of one-third of such surplus for life as her dower.

The statute contains no express declaration that the sale under the power shall bar the dower of the wife, even in the

case mentioned; but the plain import of the language is to assume that such would be the effect of the sale. Section 5, immediately preceding, provides that when the mortgage is given by the husband for purchase-money the widow shall not be entitled to dower in the land as against the mortgagee and those claiming under him, though she shall not have united in the mortgage. Where the mortgage contains a power of sale, the effect of this statute is to make the power as well as the lien of the mortgage paramount to the right of the wife, to the same extent as if reserved by the vendor out of the estate granted to the husband; and a purchaser under such a power would seem to be protected by the very terms of the statute, against any claim of the wife for dower. Her interest can only attach to the surplus produced by the sale. The statute provides for her dower right in this surplus, when the sale is made after the death of the husband; thus assuming that her right of dower in the land is cut off by the sale under the power. But no provision is made for the case of a sale in the lifetime of the husband. Whether this omission was intended to have the effect of treating the property as converted into personalty and entitling the husband to the whole surplus, if living, or to leave the wife to seek protection in equity for her inchoate right of dower in such surplus, it is difficult to determine; but it can hardly be supposed that the intention was to deprive the mortgagee of the benefit of an effectual execution of the power of sale during the lifetime of the husband. In all other cases the wife's dower is subjected to the mortgage by her joining in the instrument, and is cut off by the very terms of the statute, she being one of the mortgagors. The construction claimed by the appellant would render this an anomalous (and the only) case in which the mortgagee could not convey a good title under the power as against the wife of the mortgagor.

A sale under a decree in equity bars the equity of redemption of those only who were parties to the action, or who claim under such parties by right accruing subsequent to the commencement of the action; and in *Mills* v. *Van Voorhies*

(20 N. Y., 412) it was held that this rule was not affected by the provisions of sections 5 and 6 of 1 R. S., 741, before referred to; and that a sale under a decree, in case of a purchase-money mortgage, would not bar the wife's dower unless she were a party to the suit. But a suit in equity is a proceeding of a different character from a sale under a power. It is a judicial proceeding, directly against the parties, to obtain a decree against them, barring their respective rights and equities in the premises; and, of course, no one but parties, or those claiming under them, can be affected by the decree. At the time of the sale in question, mortgage sales, under powers, were regulated by the provisions of 2 R. S., 745, 1st ed., as amended by the act of May 14, 1840, p. 290, § 12. It is not contended that there was any failure to comply with the requirements of that act. The power was, therefore, executed in the manner prescribed by law; and so long as the law permits equities of redemption to be barred under powers, the sale under it should be deemed to cut off all rights and interests which were subject to the power, except so far as the effect of the sale was restricted by the statute. The language of the amended act was that every such sale should be "equivalent to a foreclosure and sale under the decree of a court of equity, so far only as to be an entire bar of all claim or equity of redemption of the mortgagor, his heirs or representatives, and of all persons claiming under him or them by virtue of any title subsequent to such mortgage." This, of course, refers to a suit in equity with proper parties. The only notice then required by law was publication and posting. I think the language of the section sufficiently broad to cover this case. The widow, though not deriving title from her husband, yet claims under him within the intent of that section, especially when read in connection with section 6 of 1 R. S., 741. Her title is wholly dependent upon that which he acquired. It is only by virtue of his seizin that she can claim; and her title is subject to any claim to which the title he acquired was subject. Her inchoate right of dower, though not subsequent in point of

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time was subordinate to the mortgage and subsequent to it in the order of priority; and when it ripened into an actual title by the death of the husband it was also subsequent in point of time. The language of the act is the same in this respect as it was when section 6 of 1 R. S., 741 was adopted; and that section clearly assumes that when the sale takes place after the husband's death the dower of the wife is barred. If she is a party claiming under him in that case she is in this; and the legislature must have regarded her as coming within the category of persons claiming under the mortgagor by virtue of a title subsequent to the mortgage. I can see no reason for supposing that it was their intention that the single and anomalous case of a sale during the life of the husband, under a purchase-money mortgage, should have been left, in which the mortgagee could not sell under a power, discharged from a dower right which was subject to the mortgage.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

JOSEPH BATTELL, Appellant, *v.* GEORGE W. BURRILL, Respondent.

The provision of the third section of the act of 1833 (chap. 319, Laws of 1833) amending the act incorporating the (then) village of Brooklyn, which authorizes the taking of the residue of any lot upon the written consent of the owner, where a portion thereof is required for the opening of a street, etc., provides no way for divesting the title of infants to lands not required for the contemplated improvements.

Neither the general guardian nor the guardian *ad litem* of an infant has power to give consent, and the only mode of transferring his title to the city is by proceedings pursuant to the Revised Statutes for the sale of infants' estates.

(Argued June 10, 1872; decided June 20, 1872.)

Statement of case.

APPEAL from order of the General Term of the Supreme Court in the second judicial department, reversing a judgment in favor of plaintiff, entered upon the decision of the court at Special Term and directing a new trial.

This is an action of ejectment to recover possession of a lot of ground at the corner of Bedford and De Kalb avenues, in the city of Brooklyn. Defendant claims as tenant of Matilda Steinworth, Theodore Steinworth, Charles Steinworth, Frederick Steinworth and Caroline Steinworth. This lot is part of four lots of ground which belonged to the Steinworths in 1847. In 1847 the city of Brooklyn instituted proceedings to open De Kalb avenue and close De Kalb street. The line of De Kalb avenue runs through the Steinworth lots and cuts off the lot or gore in question. Commissioners were appointed, and the usual proceedings took place. On the 30th September, 1847, upon petition of the mayor and common council of Brooklyn, the County Court of Kings county appointed Augustus H. Sidell guardian *ad litem* for the Steinworths, who were all infants under fourteen years of age. The commissioners made their first report November 11, 1847, in which they awarded the Steinworths $420 for the land taken for opening the avenue and $75 for the land left south of the new avenue. Mr. Sidell, the guardian *ad litem*, filed objections against the amount awarded, but the objections were overruled by the commissioners. In their final report the commissioners say that the lot has been relinquished, under an order of the Supreme Court, by the widow and general guardian of the infant children of Anthony Steinworth, deceased. The order referred to by the commissioners was made by the County Court in relation to opening Fulton avenue. The relinquishment referred to purports to have been made by "Margaret Steinworth, widow of the late Anthony Steinworth, deceased, and John H. Hess, general guardian of the infant children of said Anthony Steinworth." On the 23d July, 1851, the city of Brooklyn conveyed the gore lot in question to James Humphrey. The plaintiff claims title under this deed. At this time and during all

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these proceedings the Steinworths were in full possession of the premises in question.

De Witt C. Brown for the appellant. The city was authorized to take the land in question. (*Embury* v. *Conner*, 3 Comst., 511; *N. Y. C. R. R.* v. *Marvin*, 11 N. Y., 276.) The requirement of a consent in writing may be waived by the owner. (*Baker* v. *Braman*, 6 Hill, 47; *Dyckman* v. *The Mayor*, 1 Seld., 434.) The fact that the owner appeared and objected to amount of award was a waiver of such consent. (*Sherman* v. *McKeon*, 38 N. Y., 266.) The infants are bound by the acts of their attorney, and his attestation and preparation of the deed to the city was a sufficient manifestation of consent. (*Welford* v. *Beasley*, 3 Atk., 513; *Embury* v. *Conner*, 3 Comst., 511.) The confirmation of commissioners' reports is an adjudication and conclusive as to regularity of proceedings. (*Embury* v. *Conner*, 3 Comst., 511; *In re John and Cherry streets*, 19 Wend., 659.) An application under the Revised Statutes is sufficient if oral. (*O'Reily* v. *King*, 28 How., 408.) The closing of a street carries the title of adjoining owners to the center. (*Bissell* v. *N. Y. C. R. R.*, 23 N. Y., 61; *Sherman* v. *McKeon*, 38 id., 266; *Adams* v. *Saratoga R. R. Co.*, 11 Barb., 414; 1 Sandf., 323; 2 id., 334; 3 Kent's Com., 432, etc.; *Perrin* v. *N. Y. C. R. R. Co.*, 36 N. Y., 122, 124, etc.)

C. W. Sandford for the respondent. All acts taking private property, save such as the public use requires, are unconstitutional. (*Matter of Albany*, 11 Wend., 149; 51 Barb., 277; 35 How., 355.) The only exception is where owner gives consent. (*Embury* v. *Conner*, 3 Comst., 511.) One claiming title under municipal sale must show that all the proceedings were regular and in full compliance with the act. (1 Sandf., 187; *Sharp* v. *Johnson*, 4 Hill, 92; *Sharp* v. *Speir*, 4 id., 76; *Platt* v. *Stewart*, 8 Barb., 493; *Lane* v. *Morell*, 3 Edw., 185.) A guardian has no authority to sell the real

estate of an infant. (*Genet* v. *Tallmadge*, 1 Johns. Ch., 561; *Pond* v. *Curtiss*, 7 Wend., 45.)

RAPALLO, J. The premises in dispute were not taken by the city of Brooklyn in the exercise of the right of eminent domain nor for any public purpose, but are claimed to have been acquired pursuant to the third section of the act of April 30, 1833 (Laws of 1833, ch. 319), which authorizes the city, under certain circumstances, to take the residue of any lot of which a portion may be required for the opening of a street, and to sell and dispose of such residue. The act does not assume to authorize the city to take such residue by proceedings *in invitum*, but only by and with the consent in writing of the owner or owners. Such consent, when given, operates as a voluntary alienation by the owner, and obviates the objection which might otherwise be urged against the power of the legislature to authorize private property to be taken for any but public purposes.

At the time of taking of these premises, the owners (under whom the defendant holds) were infants, and therefore incapable of giving the requisite consent.

The plaintiff relies upon a written consent, signed by the mother of the infants and by John Hess, styling himself their general guardian, to which instrument Augustus H. Sidell, who was appointed guardian *ad litem* for the infants in the proceeding, is subscribing witness.

There is no provision in the act of 1833, or in any other act to which we have been referred, authorizing either the general guardian or guardian *ad litem* of infants to consent in their behalf to the taking of their lands. The act of 1833 provides no means of divesting the title of infants to lands not required for the improvements. It does not purport to be compulsory upon any one in respect to such lands, but simply empowers the commissioners with the written consent of the owner to include such lands in their estimate, and award compensation therefor. When there is no owner capable of consenting, the condition of the act cannot be complied

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with, and if the owners are infants, the only mode of transferring their title to the city is by proceedings pursuant to the Revised Statutes for the sale of infants' estates.

The order of the General Term should be affirmed, and judgment absolute rendered against the plaintiff, with costs.

All concur.

Order affirmed, and judgment accordingly.

WILLIAM A. COIT, Appellant, *v.* JOSEPH B. STEWART, Respondent.

Where an agent converts property of his principal in his hands, and which he has agreed to account for and pay over, the principal has his election to sue for the breach of the contract or for the conversion; and if he elects to proceed for a breach of the contract, he may interpose it as a counter-claim in an action upon contract brought against him by the agent.

An order of General Term reversing an order of Special Term sustaining a demurrer, is not appealable to this court.

(Argued June 11th, 1872; decided June 20th, 1872.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, reversing an order of Special Term sustaining demurrer of plaintiff to a count of defendant's answer setting forth an alleged counter-claim.

The action was brought to recover the amount of two promissory notes executed by plaintiff. The substance of the counter-claim is set forth in the opinion. The grounds of the demurrer were, that the matters set up in the answer constituted tort, that it alleged that plaintiff acted in a fiduciary capacity, and that the claim is for unliquidated damages.

Samuel Hand for the appellant. The alleged counter-claim sets up a tort. (Sub. 2, § 179, Code; *Elwood* v. *Gardner*, 45 N. Y., 382; see Burrill's L. D., vol. 2, T.; Bouvier, id., 590; 1 Foubl. Eq., 4, and article Injury; 3 Blackstone

Com., 117; Code, § 179; *Gardiner* v. *Elwood*, 10 Abb. P. R. (N. S.); *International Bank* v. *Monteith*, 39 N. Y., 300; *Drake* v. *Cockroft*, 4 E. D. Smith, 34; *Edgerton* v. *Page*, 14 How. P. R., 116; *Mayn* v. *Parker Vein S. S. Co.*, 12 Abb., 300; *Edgerton* v. *Page*, 1 Hilton, 320; *Same*, 5 Abb. P. R., 1; see, also, 203; *Edgerton* v. *Page*, 18 How. P. R., 259; *Patison* v. *Richards*, 21 Barb., 143; *Bennett* v. *Parker*, 16 N. Y., 251.) A tort cannot, therefore, be set up as a counter-claim in an action on contract. (See 4 E. D. Smith, 34; 1 Hilton, 320; 4 Abb., 1; 18 How., 259; *DeLeyer* v. *Michaels*, 5 Abb., 203; 39 N. Y., 383; 22 Barb., 143; 14 How., 116; 12 Abb., 300.)

Birdseye & Crosby for the respondent.

GROVER, J. The counter-claim set up in the fourth defence was founded upon contract. The allegation in substance is that the plaintiff, in consideration of a specified reward therefor to be paid him by the defendant, undertook to complete the negotiations for the purchase by the defendant of certain securities, and promised the defendant that he would account for and pay over all moneys and deliver all securities belonging to the defendant to him, which he had refused to do, and had converted to his own use. Upon these facts the defendant had his election to sue for the breach of the contract or for the conversion of the securities. The statement in his defence shows that he has elected the former. (*Conaughty* v. *Nichols*, 42 N. Y., 83.) Having made his election to proceed for the breach of the contract, it may be interposed as a counter claim against the notes counted upon by the plaintiff. The order of the General Term reversing that of the Special Term sustaining the demurrer of the plaintiff to that defence and ordering judgment for the defendant thereon, was right and should be affirmed, if an appeal therefrom as an order could be taken to this court. But it is not appealable to this court. If the plaintiff had permitted judgment to be entered thereon, it could have been reviewed by this

court, upon an appeal from a final judgment in the action. (*Ferris* v. *Aspinwall*, decided by this court in March, 1871, opinion by ALLEN, J., not reported.) The counsel for the appellant cites *Rogers* v. *Wheeler* (43 N. Y., 598) as an authority, holding the order appealable. An examination of the case shows that no such question was raised, discussed or determined. The question was doubtless waived by counsel, and as the litigation could be substantially terminated by deciding the questions presented by the demurrer, the court passed upon them. There is no conflict between this case and *Ferris* v. *Aspinwall*. The order is not appealable to this court, and the appeal must be dismissed, with costs.

All concur.

Appeal dismissed.

MAX SPRINGER, Respondent, *v.* THOMAS N. DWYER, Appellant.

Where, in an action upon a promissory note, the answer alleges facts sufficient to constitute a defence of want of consideration, or a recoupment of damages, it is not necessary for defendant to state which he will rely upon; and if he so states, he will not be precluded from insisting upon any defence which the facts alleged will justify. It is the facts alleged which constitute the defence, and whether or not it is called by the right name is immaterial.

When a principal and surety are sued together, a successful recoupment by the former will inure to the benefit of the latter, although the surety could not, if sued alone, avail himself of the defence.

(Argued June 3, 1872; decided June 20, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiff entered upon a verdict. (Reported below, 58 Barb., 189.)

The suit was brought upon a promissory note for $500, dated September 15, 1866, made by the defendant Dwyer, payable to the order of Henry Dreyfous, sixty days from date, and indorsed by Dreyfous and Mossman. The answer

of defendant Dwyer denied that plaintiff was a *bona fide* owner or holder of the note, and that it was given upon a purchase of the interest of the payee in a copartnership induced by false representations of said payee; and that, in fact, no consideration was received for said note.

The defendant Dwyer, and Dreyfous, the payee, were partners in business, and the note was given on the settlement of partnership affairs upon the purchase of Dreyfous' interest in the partnership, business, property, fixtures and effects by the defendant Dwyer, he to pay the partnership debts.

The defendant Dwyer testified that some five or six days after the note fell due the plaintiff told him he did not own the note, and Dwyer then related to him the circumstances under which the note was given and the defence he had to it.

That during the existence of the copartnership Dreyfous had kept the partnership books.

That at the time of the dissolution Dreyfous falsely and fraudulently represented that the amounts due the firm were, in fact, as appeared on the books.

That the debts appearing by the books to be due were, in fact, due to the firm; and that no debts had been contracted by Dreyfous other than what appeared on the books.

That, in point of fact, an amount of debts owing to the firm, according to the books, of more than $500, had been collected by Dreyfous, and not entered in the books; and that Dreyfous had also contracted debts in the name of the firm to the amount of over $500, which had not been entered on the books.

That without the knowledge of the defendant, Dwyer, Dreyfous had drawn $707 from the bank in Dwyer's name, prior to giving the note. Also, at the time of giving the note, an agreement was made between Dwyer and Dreyfous that, if it should appear on examining the books that there was not $500 due to Dreyfous, the note should not be paid. That Dwyer afterward, on examining the books, ascertained that nothing was due to Dreyfous, and notified him, while he held the note, that he should not pay it. These several offers were

ruled out by the court, and the defendant's counsel excepted.

The court then directed a verdict for the plaintiff for the amount of the note.

Erastus Cooke for the appellant. That the note was procured by false and fraudulent representations was a good defence. (*Barber* v. *Kerr*, 3 Barb., 149; *Sill* v. *Rood*, 15 J., 230.)

S. P. Nash for the respondent. The remedy of defendant Dwyer for the false representation, if he retained the partnership transfer, was only an action for damages against Dreyfous. (*Nickerson* v. *Howard*, 19 Johns., 113; *Bellows* v. *Folsom*, 2 Robt., 138; *Goelth* v. *White*, 35 Barb., 76; *Curtiss* v. *Howell*, 39 N. Y., 211, 214.) The offer to show a parol agreement varying the writings, was properly excluded. (*Thompson* v. *Hall*, 45 Barb., 214.)

CHURCH, Ch. J. The ground upon which the offer to prove the fraud of Dreyfous was rejected does not appear. No ground was specified, either in the objection or decision. One of the learned judges, who delivered an opinion below, justifies the rejection upon the ground that the offer did not constitute a defence based upon a rescission of the contract, because it is not stated that the defendant Dwyer reassigned, or offered to reassign, the partnership effects which had been assigned to him when the note was given. This was undoubtedly necessary if a rescission was claimed as the only defence; but if this ground had been specified we cannot say that the defect might not have been supplied or obviated. It may have been rejected upon the ground that it was not shown that the plaintiff was not a *bona fide* purchaser of the note before maturity; and, from the various offers made and rejected, as they appear in the case, it is not improbable that such was the opinion of the court; and one of the learned judges at the General Term intimates that such proof was not made. It was proved that the plaintiff stated, a few days

after the maturity of the note, that he did not then own it. This evidence was not sufficient to base a defence of a want of title to the note at the time of the commencement of the action; but it was sufficient *prima facie* to show a want of title when the note became due so as to let in any defence which the defendant had. Besides, the offer, taken together, is ambiguous. It may be inferred that the defendant could prove that the entire consideration for the note was the fact assumed by the fraud of Dreyfous that the books were correct, and the sum of $500 was due him thereon; and if the objection had been specific the offer could have been made more explicit. If the facts stated would not constitute a defence, on the ground of a rescission and failure of consideration, they were competent to establish a recoupment. It is said that this defence was not set up in the answer of either Dwyer or Mossman, and that it could only be available to Dwyer alone. No objection was made on account of the pleadings. If such objection had been made, the defendant, if necessary, might have procured an amendment.

But Dwyer's answer contains all the facts necessary to constitute a defence for want of consideration, or for a recoupment of damages, and it was not necessary to state which he would insist upon; or if he did so state he would not be precluded from insisting upon any defence which the facts alleged would justify. It is the facts alleged which constitute the defence; and whether the party calls it by the right name is not material. And when the principal and surety are sued together a successful recoupment by the former would inure to the benefit of the latter as well, although the surety could not, if sued alone, avail himself of this defence. (25 N. Y., 306.)

We think there should be a new trial.

All concur.

Judgment reversed and new trial ordered.

Statement of case.

FREDERICK D. VINER et al., Appellants, v. THE NEW YORK, ALEXANDRIA, GEORGETOWN AND WASHINGTON STEAMSHIP COMPANY, Respondent.

On the 20th February, 1869, plaintiffs shipped by defendant's line a quantity of butter to be carried from New York to Georgetown, consigned to plaintiffs' order; the packages were unmarked. One S. presented to defendant's delivery clerk a letter written by plaintiffs to him, containing this clause: "The roll sent you to-day (the twentieth) you will find of very good quality," and upon this the clerk delivered the butter to S. In an action for the conversion plaintiffs were nonsuited. *Held* that, as a question of law, the letter was not a sufficient authority to justify a delivery of the butter to S.; nor was the writing of it negligence *per se*, but it was a question of fact for the jury to determine, from the letter and the other facts of the case, whether by plaintiffs' negligence or otherwise the defendant was excused or justified in the delivery of the property. The nonsuit was therefore error.

The undisputed existence of a fact sometimes constitutes negligence at law; but where inferences are to be drawn, or it depends upon circumstances, it is a question of fact to be determined by a jury.

(Argued April 19, 1872; decided June 20, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of defendant entered upon an order of the court dismissing plaintiffs' complaint.

This action was brought against the defendant, as common carrier, for the conversion of a quantity of butter shipped by plaintiffs at New York to Georgetown.

The defence was that the butter had been delivered to one George E. Smith, a consignee of plaintiffs, under a letter which, it was claimed, gave him an apparent right to receive it.

The butter was shipped on the 20th February, 1869; there was no bill of lading given. The entry on the manifest of the vessel was eleven packages of butter, marked [S.] in a diamond, shipped by F. Viner & Co. (the plaintiffs) "to order."

The butter was delivered to one G. F. Smith by the delivery clerk of defendants at Georgetown on the faith of a

letter written to him by one Hyde, agent, which contained the following clause:

"The roll *sent you to-day* (twentieth) you will find of good quality," etc.

Smith had been a dealer with plaintiffs, and they had consigned butter to him by defendant's line of steamers.

E. Terry for the appellants. Smith could not have maintained an action against defendant if it had refused to deliver to him. (*McEntee* v. *N. J. Steam. Co.*, 45 N. Y., 34; *Assignees of Burkhall* v. *Howard*, H. Blackstone, 365, note.) The evidence was sufficient to require the submission of the cause to the jury. (*McEntee* v. *N. J. Steam. Co.*, 45 N. Y., 34; *Smith* v. *Asken*, 23 Wend., 658; *Franchers* v. *Henriques*, 24 How., 165; *Ireland* v. *Plank-road Co.*, 3 Kerr., 533; *Howard* v. *Gould*, 3 Keyes, 422; 1 Wend., 276; 6 id., 436; 3 Hill, 287; *Astor* v. *N. Ins. Co.*, 7 Cow., 202.) Common carriers are insurers. (1 Par. on Con., 634.) The fact that a cartman is exclusively employed by a consignee, does not justify a delivery to him without order. (*Ostrander* v. *Brown*, 15 J., 39.)

S. P. Nash for the respondent.

CHURCH, Ch. J. I cannot agree with the learned judge who tried this cause at the Circuit, that the letter from the plaintiffs to Smith was as a question of law sufficient authority for the defendant to justify a delivery of the butter to him.

The property was shipped to Georgetown, consigned to the plaintiffs' order, and not marked with the name of any person. The carrier had no right to deliver it except upon the order of the plaintiffs. It is well settled that a delivery to a wrong person is a conversion. The letter claimed as authority was written to Smith, and not to the defendant. It does not purport to be an order for the delivery of the property; it does not state that any butter was sent to Smith, nor in any man-

ner authorize him to receive it. It refers to butter sent, but not to him, nor does it specify the quantity or the number of packages, or the line or agency which transported it, and it was not marked with his name. Assuming that the letter refers to the same butter, which it probably did, the most liberal inference which could be drawn from it was that the plaintiffs intended that Smith would have an opportunity of seeing it, or selling it, or at most, intimating that the plaintiffs might thereafter give him an order for it, but it is an unwarrantable stretch of construction that it authorized the carriers to deliver it to him.

Indeed, a contrary inference is quite as rational. The letter bears date the same day of the shipment, and says; "Am sorry you did not send returns yesterday, as you expected, as *should have shipped you much more*, but Mr. Viner's previous experience has made him very cautious of new men." The plaintiffs were asking for returns for previous sales, and regretting that they had not been sent, as in that event they "*should have shipped*" more, but as he had not and they were cautious of new men, it may be inferred that they had refrained from doing so. Without intending to say whether this is a proper inference or not, it is quite as legitimate as the inference that an order or authority is contained in other parts of the letter to deliver the butter to Smith.

The defendant acted in good faith, doubtless, but to permit carriers to deliver property expressly consigned to the order of the consignor upon an authority to be spelled out of language not addressed to them, and so uncertain and ambiguous, would encourage laxity and negligence and lead to great injustice to the owners of property, and would be contrary to law and sound business principles. Common carriers cannot thus easily relieve themselves from responsibility. Their liability continues until the property is delivered according to the consignor's order, and it is no answer for a wrong delivery to say that it was done by mistake and with no bad intent. The consignor required a delivery to his own order; the delivery was made without such order, and consequently at

the risk of the carrier. If the defendant had refused to deliver the butter, and Smith had brought an action to recover it upon the authority of this letter, no court would have tolerated the action for a moment. It was not, therefore, their duty to have delivered it upon this authority, and the most favorable disposition of the case for the defendant would have been to submit the question to the jury upon the letter and all other facts of the case, to determine whether from the plaintiffs' negligence or otherwise the defendant was excused or justified in delivering the property as it did. An effort was made to prove that the plaintiffs had made prior consignments of packages to Smith marked in the same manner, but the evidence upon this point was conflicting. It would be a material circumstance in favor of the defendant if it could establish that the plaintiffs had been in the habit of shipping property to Smith marked like this and deliverable to their own order, as evidence of a usage in transacting this particular business. The evidence given on this trial not only does not establish this, but tends to show that previous shipments were consigned to and marked for Smith, and that it was not intended that he should receive this property without further orders.

It is urged that the plaintiffs' negligence in writing such a letter caused the delivery and produced the injury. The writing of the letter was not negligence *per se*. The undisputed existence of a fact sometimes constitutes negligence in law, but when inferences are to be drawn, or it depends upon circumstances, it is a question of fact to be determined by a jury. The learned counsel for the respondent has referred to no authority justifying the ruling of the court, and I am confident none can be found.

The judgment must be reversed and a new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

EMIL HEINEMANN et al., Appellants, v. JOHN HEARD et al., Respondents.

It is not necessary to show fraud, upon the part of an agent, in order to maintain an action against him for neglecting to perform a duty which he has undertaken. An agent is bound, not only to good faith, but to reasonable diligence, and to such skill as is ordinarily possessed by persons of common capacity engaged in the same business.

Plaintiffs sent to defendants, their correspondents in China, an order to invest £5,000 in silk, of one or the other of several specified descriptions, at prices named, and in accordance with the terms of a letter of credit which required bills to be drawn prior to July 1st. Defendants did not comply with the order; and in answer to plaintiffs' complaints wrote, admitting that the silk could have been purchased within the prescribed prices, but stating, as an excuse for not purchasing, that they expected prices to be lower, and therefore, waited until the prices advanced beyond their limits, and expressing regret at their erroneous judgment. *Held*, that the order gave defendants no discretion, save as to the selection of the silk. That it was their duty to have selected some of the descriptions specified, if they were to be obtained, in time to ship under the letter of credit. That defendants' letter was an admission of their ability to have executed the order, which, although it did not preclude them from showing any impediment preventing performance, yet was sufficient to require the submission of that question to a jury.

The rule of damages in cases of marine trespass (*i. e.*, the precise cost or value of the article at the time of the loss, with interest) is not applicable to the case of the violation of a contract entered into for the express purpose of procuring goods for sale at their place of destination. A loss of profits, the direct consequence of the breach, if within the contemplation of the parties at the time of making the contract, and if not speculative or contingent, may be recovered. (RAPALLO, J.)

(Argued May 22, 1872; decided June 20, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment in favor of defendants entered upon an order of the court at circuit directing a dismissal of the complaint. (Reported below, 58 Barb., 524.)

This action was brought to recover damages for an alleged breach of duty, upon the part of defendants, as plaintiffs' agent.

Statement of case.

The plaintiffs are copartners, carrying on business in the city of New York under the firm name of Heinemann & Payson.

The defendants are commission merchants and copartners, carrying on that business at Hong Kong and elsewhere in China, under the firm name of Augustine Heard & Co.

In the year 1864 an arrangement was entered into between the plaintiffs and defendants, by which the latter were to become the correspondents of the former for the purchase of teas and silks in China for account of the plaintiffs.

In order to put the defendants in funds for the purchase of teas and silks, a credit in favor of the defendants, with George Peabody & Co., of London, for £15,000 sterling, was obtained by plaintiffs. The plaintiffs gave the defendants their first instructions to purchase by a letter dated the 23d December, 1864, addressed to the defendants at Hong Kong. It directed the investment of £5,000 in No. 1 re-reeled silk (if possible, all white), at 18s. sterling for Cumchuck, or at 16s. sterling for No. 1 Loong Kong or Kow Kong, free on board; and £10,000 sterling in fair cargo Foochow Oolongs, at a price not exceeding 9d. (say 9d. sterling) per pound. These instructions were modified by a letter dated May 2d, 1865, in these respects, namely: The limit of price for silk was increased five per cent; and for the Oolongs the defendants were authorized to substitute fine Moyune teas from Canton or Shanghai, the usual assortment of fully fair cargo, at a price of 1s. 7d. per pound sterling, free on board, without freight and insurance; for the Ting Tai, 2d. per pound higher.

The first letter was received on the 22d February, 1865, and the second on the 7th July, 1865. By its original terms the bills were to be drawn prior to the 1st July, 1865; the time was extended to September 1st. The defendants were notified of the extension by the plaintiffs' letter of May 12th, which notice was received by the defendants on the 6th July, 1865. No purchases were made by the defendants for the plaintiffs under these orders, nor any part of the credit used.

At this time there was a certain joint account arrangement

Statement of case.

on foot between the plaintiffs and the defendants, and the plaintiffs, in a letter dated June 6th, 1865, advised the defendants as follows: "Any amount unused of our first credit of £15,000 you may apply for the benefit of the joint account arrangement."

This letter was received August 8th, 1865; no part of the credit, however, was applied. Other facts appear in the opinion.

W. W. Macfarland for the appellants. Defendants impliedly undertook to execute plaintiffs' orders with due diligence, and were not at liberty to exercise a discretion. (*Entwish* v. *Dent*, 1 Exch., 811; *Guerreiso* v. *Peile*, 3 B. & Ald., 616; *Harmer* v. *Cornelius*, 5 Com. B. [N. S.], 236; Smith's Mercantile Law, 7th ed., 113; *Coggs* v. *Bernard*, and notes, 1 Smith's Lea. Cases, 5th ed., pp. 334, 335; *Courcier* v. *Ritter*, 4 Wash., 549, and notes,; 1 Am. Lea. Cases, 4th ed., 687; *Bell* v. *Cunningham*, 5 Mason, 161; *Same Case*, 3 Pet., 69; Smith's Mercantile Law, 113.) The court erred in granting a nonsuit. (*Knickerbocker, etc., Co.* v. *Anderson*, 2 Vroome [N. J.], 333; *N. Y., etc., Insurance Co.* v. *Graham*, 2 Duvall, [Ky.], 506; *Clark* v. *First, etc., Society*, 45 N. H., 331; *Flemming* v. *Smith*, 44 Barb., 554; *Scarritt* v. *Carruthers*, 29 Ill., 487; *Johnson* v. *Hamburger*, 13 Wis., 175; *Barbey* v. *Lavos*, 15 Ind., 109; *Mackay* v. *N. Y. Central R. R. Co.*, 27 Barb., 528; *McDaniel* v. *Parks*, 19 Ark., 671; *Milo* v. *Gardner*, 41 Maine, 549; *Lindsay* v. *Whalen*, 17 Ark., 385; *Abernethy* v. *Wayne Co. Bank*, 5 Ohio [N. S.], 256; *McCattrick* v. *Wasson*, 4 id., 566; *Wendell* v. *Moulton*, 6 Foster [N. H.], 41; *Gould* v. *White*, 6 id., 178; *Babcock* v. *Porter*, 20 Conn., 570; *Bishop* v. *Firkens*, 19 Conn., 300; *Wendell* v. *Safford*, 12 N. H., 171; *Ways* v. *Collinson*, 6 Leigh, 230; *Medlar* v. *State*, 26 Ind., 171; *State* v. *Burnside*, 37 Mo., 343; *Gaines* v. *Forcheimer*, 9 Fla., 265; *Bloom* v. *Crane*, 24 Ill., 48; *Dart* v. *Farmers' Bank*, 27 Barb., 337; *Clark* v. *Whittaker*, 19 Ct., 319; *Chicago, etc., Railroad Co.* v. *Northern Ill., etc., Company*, 36 Ill., 60; *Hopper* v. *Jones*,

29 Cal., 18; *Lewis* v. *Blake*, 10 Bosw., 198; *Rowe* v. *Smith*, id., 268; *Ammons* v. *State*, 9 Fla., 530; *Brockman* v. *Berryhill*, 16 Iowa, 183; *Brown* v. *Jefferson*, 6 Iowa, 339; *Edminston* v. *Garrison*, 18 Wis., 594; *Munes* v. *Carter*, *Law Reports*, 1 Privy Cl., 530; *Lubeck* v. *Bullock*, 24 Cal., 338; *People* v. *Townsend*, 37 Barb., 520; *Breese* v. *State*, 12 Iowa, 146; *Lisbon* v. *Bath*, 3 Foster [N. H.], 1; *Fowler* v. *Waldrit*, 10 Georgia, 250; *Allen* v. *Jarvis*, 20 Conn., 38; *Flemming* v. *Hollindike*, 7 Barb., 271; *McDonald* v. *Edgerton*, 5 id., 560; *Johnson* v. *Winona, etc., R. R. Co.*, 11 Minn., 296; *Tolman* v. *Race*, 36 Ill., 472; *Brainerd* v. *Van Curen*, 22 Iowa, 261; *McDuffy* v. *Stewart*, 30 Georgia, 661; *Raguel* v. *Dessure*, 30 id., 690; *Chicago, etc., R. R. Co.* v. *Hutchins*, 34 Ill., 108; *Haralich* v. *Haralich*, 18 Iowa, 414; *James* v. *Baker*, 49 Maine, 427; *McKay* v. *Thorington*, 15 Iowa, 25; *Gordon* v. *Coleman*, 48 Maine, 473; *Housatonic R. R Co.* v. *Noles*, 30 Conn., 313; *Bolton* v. *Howell*, 18 Ind., 181; *People* v. *Vance*, 21 Cal., 400; *Hall* v. *Hunter*, 4 Green, [Iowa], 539; *Smith* v. *Tiffany*, 36 Barb., 24; *Heritage* v. *Hall*, 33 id., 347; *Gallop* v. *Smith*, 24 Ill., 586; *Purvis* v. *Coleman*, 1 Bosw., 321; *Derwort* v. *Loomer*, 21 Ct., 245; *Haight* v. *Turner*, 21 id., 593; *Swartzer* v. *Rogers*, 3 Kansas, 374; *Craft* v. *State*, 3 id., 450; *Welch* v. *Bogg*, 12 Mich., 241; *Chapman* v. *Read*, 18 Ind., 272; *Tracy* v. *Hartman*, 1 Hilton [N. Y. C. P.], 350; *Waters* v. *Bristol*, 26 Ct., 398; *Walf* v. *State*, 11 Ind., 231; *Erben* v. *Lorillard*, 23 Barb., 82; *Weld* v. *Chadborn*, 37 Maine, 221; *Wilkinson* v. *Corwell*, 1 Curtis [Ct. Ct.], 63; *Holman* v. *Dord*, 12 Barb., 336; *Hogen* v. *Henry*, 1 Eng., 86; *Goodman* v. *Smith*, 4 Der., 450.)

E. W. Stoughton for the respondents. If the evidence is not contradictory, and on the plaintiffs' proofs they have no right to recover, there is nothing to be left to the jury, and it is the duty of the court to grant a nonsuit. (*Carpenter* v. *Smith*, 10 Barb., 664; *Bidwell* v. *Lamnet*, 17 How., 359; *Ernst* v. *H. R. R. Co.*, 24 How., 103; *Steward* v. *Simpson*,

1 Wend., 376; 3 Hill, 287; 7 id., 329.) Upon the allegations and proofs of the plaintiffs, no verdict for any damages could have been sustained. (Story on Agency, § 220; *Bell* v. *Cunningham*, 5 Mason, 161; *Same*, 3 Peters, 69, 84, 85; *Schooner Lively*, 1 Gallison, 325; *Griffin* v. *Colver et al.*, 16 N. Y., 491.)

RAPALLO, J. In so far as the plaintiffs' cause of action is founded upon the failure of the defendants to fill the plaintiffs' order for teas, we concur in the opinion of the court below that a case was not made out, sufficient to have been submitted to the jury. The original order was for Oolongs; but it appears that these could not have been purchased at the plaintiffs' limits. By their letter of May 2, 1865, the plaintiffs authorized the substitution of "Fine Moyune teas, the usual assortment of fully Fair Cargo." The plaintiffs' witnesses agree that this order was ambiguous; as "Fine Moyune" and "Fair Cargo" denote different grades; the "Fine" being a superior grade to "Fair Cargo;" and some of them testify, without contradiction, that the order would be understood by the trade as calling for "Fine" Moyune. There is no evidence establishing that this grade could have been purchased in conformity with the order. The evidence in relation to the invoices of Moyune teas which arrived at this port not only fails to show that they were Fine Moyune, but establishes that they did not come under that designation. As to this branch of the case, therefore, the nonsuit was properly granted.

But a very different case is presented in respect to the order for silk. By their letter of December 14, 1865, the defendants undertook to explain their omission to execute the order, and to answer the loud complaints in that respect contained in the plaintiffs' letters of September 26 and October 3, 10 and 12. In this letter of December 14, the defendants admit that they might have purchased the silk in June at $480 to $500 per picul (the plaintiffs' limit being a fraction over $525); and they give their reason for not having

done so. They do not claim that there was any difficulty in obtaining silk of the quality ordered, or in procuring its shipment in time to enable them to draw for the price under the letter of credit. The only reason they assign for the non-fulfillment of the order is that they thought it best to delay purchases in the hope of a still further decline in the price, from causes which they mention; and that in this hope they waited till after the first of July, when news arrived from Europe which advanced the rate. They state this to have been the reason which prevented their action while action was possible; and, in answer to plaintiffs' complaints in respect to their omission to keep them advised, they state that they delayed writing while they still hoped for a chance to buy; and that their feeling of annoyance at having been led to a wrong decision must be their excuse for not having done so later. They admit that they erred, but claim that they did so from a reasonable hope of doing better for the plaintiffs than their instructions.

Without regard to the other evidence in the case in support of the plaintiffs' claim, we think that, on the question of the ability of the defendants to have executed the order for the silk, this letter was sufficient to have required the submission of that question to the jury. The defendants were in a position to have better knowledge of the facts than any other person; and the jury would have been authorized to regard this letter as an admission that the only excuse the defendants had for not having executed the order was that they waited in the hope of buying on much more advantageous terms than the plaintiffs had directed; and, in that case, the only question remaining would have been as to the sufficiency of the excuse, in connection with the explanations given, and the facts appearing on the trial.

The letters, to which that of the 14th of December was an answer, were such as to call upon the defendants for the best reasons they could give for their failure to fill the order. If they made proper efforts and met with obstacles, or if they could not obtain the necessary facilities for shipment, those

facts must have been within their knowledge; and it cannot be supposed that, under the circumstances, they would have been content to assign, as their only excuse, an admitted error of judgment, had facts existed showing that they were not in fault, and that it was out of their power to have performed the duty they had undertaken. Their omission to state any such facts, and their concession that they had erred in not executing the order, might fairly be regarded as implying an admission that they could have executed it had they not voluntarily refrained. (See *Entwisle* v. *Dent*, 1 Exch., 823.)

This admission was not conclusive upon the defendants, and would not preclude them from showing any impediment which may have existed to the execution of the order, such as the absence of any vessel in which to make the shipment, or their inability, notwithstanding diligent efforts, to find the required qualities or procure the silk to be re-reeled in time to be shipped and drawn against under the letter of credit. But it made a *prima facie* case for the plaintiffs in those respects, and relieved them from the necessity of going into proof as to those facts in the first instance.

The plaintiffs, however, did not repose wholly upon the letter of December 14, but introduced proofs upon these several points; and it is claimed, on the part of the respondents, that these proofs not only fail to show that the order for silks could have been executed, but, on the contrary, establish that it was impracticable.

Unless the latter proposition can be maintained the effect of the admission, inferable from the letter of December 14, is not destroyed. But a careful review of the evidence satisfies us that it is not inconsistent with the positions claimed by the plaintiffs, but tends to support their allegations. There is some conflict between the witnesses as to the time necessary to obtain the silk for shipment; but on the question of the propriety of a nonsuit, the plaintiff is entitled to the benefit of such of the testimony as is most favorable to him, and to the most favorable construction of that testimony. Viewed

in that manner, it establishes the fact that, from about the 10th, and, as one witness states, from the 5th, of June, the price of silk of the quality ordered was from $480 to $500 per picul; and that during the month of June a much larger quantity than that ordered by the plaintiffs was sold at those prices. The evidence taken on commission speaks of the period of greatest depression, but does not show the price paid to 10th or the 5th of June, except that one witness states that on the 20th of June he delivered thirty boxes at $500 per picul, under a contract for delivery in three weeks, on order about four weeks previously. This testimony also shows that the time necessary for re-reeling and preparing silk for shipment varied according to the amount ordered. One witness states that the usual time, consumed between the dates of making contracts for such silk and obtaining possession of it ready for shipment, was three or four weeks for 100 boxes if ordered from one man. Another, that the usual time was three weeks. Another, that the usual time was three weeks for 150 boxes if contracted for from one dealer only. The quantity ordered by the plaintiffs was about 120 boxes, or forty-five piculs. No witness states that it could not be procured in less time if ordered in smaller lots from different dealers. They speak of the amount one dealer could produce in three weeks or a month. The witness who testifies to the longest time as being necessary, testifies that his own firm obtained 37½ piculs, which was nearly the amount required by the plaintiffs, at $482.50; that it was contracted for on the 13th of June and actually delivered on the 26th of June.

Neither does the evidence show that the shipment was impracticable for want of a vessel. In their circular of 27th June the defendants mention at least one vessel, the Thorkeld, then loading for New York. They say she was then full; but this does not show that, with proper diligence, they could not have secured room in her before that time. She appears to have sailed on the 1st July, and to have arrived at New York on the 11th of December, her cargo having been sold to arrive.

The question in the case was one of due diligence, and we think that there was sufficient evidence to go to the jury on that point. The position cannot be maintained that fraud on the part of the agent is necessary to subject him to an action for neglecting to perform a duty which he has undertaken. An agent is bound not only to good faith but to reasonable diligence, and to such skill as is ordinarily possessed by persons of common capacity engaged in the same business. (Story on Agency, §§ 183, 186.) Whether or not he has exercised such skill and diligence is usually a question of fact; but its omission is equally a breach of his obligation and injurious to his principal, whether it be the result of inattention or incapacity, or of an intent to defraud. In the case of *Entwisle* v. *Dent* (1 Exch., 822) there was an element of fraud as well as breach of duty; but the judgment of the court was not founded upon the fraud, nor could it be, as the action was for breach of the implied contract of the defendant to act according to instructions.

As an independent ground for sustaining the nonsuit, it is claimed, on the part of the defendants, that the order to purchase silk was discretionary, and that for that reason they are not responsible in damages for their failure to execute it.

By reference to the letter of December 23, 1864, it will be seen that no discretion was given whether or not to purchase. The order to invest £5,000 in silk of one or other of the particular descriptions mentioned, and at the prices named, was absolute. The only matter left to the discretion of the defendants was the selection of the silks as well as the teas. They were instructed to purchase either Cumchuck at 18*s*., or No. 1 Loo Kong, or Kow Kong, at 16*s*., and were requested to obtain all white if possible; otherwise, to separate the white from the yellow. No other matters were left to their discretion. It was their duty to select some of these descriptions, if they were to be obtained, and to use reasonable diligence in obtaining the required quantity in time to ship under the letter of credit. It is argued that as they had discretion in the selection of the silks, and had to determine whether it

was possible to obtain all white, no period can be fixed as the time when they were bound to decide these matters and make the purchase. This argument is not satisfactory. The necessity of making a selection may have justified them in not accepting the first offer which they may have met with, and in looking further for the purpose of complying with the wishes of their correspondents; but it would not justify them in allowing all opportunities to pass, and the time to elapse within which they could purchase under the letter of credit. They were bound to make a selection within a reasonable time, and, at all events, before the time for shipping, under the credit, expired. The prices appear to have continued below their limit from the early part of June until the first term of the letter of credit had run out; yet they allowed all that time to elapse without making any selection. Such delay was certainly evidence of a want of due skill and diligence, if attributable merely to a failure to come to a decision.

But the defendants do not, in their correspondence, take any such ground, or claim that they regarded themselves as having any discretion as to purchasing the silks and tea. On the contrary, in their letter of February 27, 1866, they say: "We were bound to follow your instructions for the investment of the £15,000 credit first sent, and have already explained to you our reasons for not having purchased silk;" referring to their letter of December 14, 1865. They rest their justification wholly upon the ground that while the silks were below the plaintiffs' limits they held off in the attempt to obtain them at still lower prices. They were scarcely justified, however, in persisting in this attempt until it became too late to ship under the letter of credit as originally drawn or as extended.

The letter, authorizing the applicafion of the unused portion of the £15,000 credit to the joint account transactions, did not reach the defendants till August 7, 1865, and constituted no excuse for any default occurring before that date.

It is urged that no damage was shown, and, therefore, the

nonsuit should be sustained. Even if no special damage had been proven the complaint should not have been dismissed. The breach of a contract, or of a duty arising from a contract, is sufficient to entitle a plaintiff to maintain his action, and to render a nonsuit improper. (1 B. & Ald., 415; 3 Adol. & Ell. [N. S.], 516.) But the plaintiffs had introduced proofs, without objection, showing the market price of the silks at New York during the months of September, October, November and December, 1865, and the prices at which they could have been sold to arrive. It is not necessary now to decide what is the proper rule of damages; but we are not prepared to sanction the idea that the rule adopted in cases of marine trespass (which is the prime cost or value of the property at the time of the loss, with interest [3 Wheat., 560]) is necessarily applicable to the case of the violation of a contract, entered into for the express purpose of procuring goods for sale at their place of destination, when their market value at that place can be shown. The fact that damages have been sustained must be proved with reasonable certainty; but even a loss of profits, if within the contemplation of the parties at the time of entering into the contract, and a direct consequence of the breach, and not speculative or contingent, may be recoverable. (*Griffin* v. *Colver*, 16 N. Y., 494, 495; *Masterton* v. *The Mayor*, 7 Hill, 61; *Cunningham* v. *Bell*, 5 Mason, 172; 3 Peters, 85.) The certainty of the loss claimed must depend upon the evidence; but to apply to such contracts the rules settled in cases of capture and collision would, in the generality of cases, exempt foreign agents from all responsibility for breaches of their contracts with, or violation of their duty to, their principals in respect to the purchase and shipment of goods, whether arising from negligence or fraud.

It is enough, at the present stage of the case, to say that the evidence on the subject of damages was received without objection, and that the nonsuit was not moved for, or granted on the ground of any defect of proof in this respect, but on the sole ground that the plaintiffs had not given any evidence

of their alleged cause of action sufficient to go to the jury. We think they have shown enough in respect to the silk to put the defendants to their defence, and that the judgment should therefore be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

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MARCELLUS HARTLEY, Respondent, *v.* EDWARD D. JAMES et al., Appellants.

In an action against a vendor to recover back a payment made upon an executory contract for the sale of land, an abstract of title of the land agreed to be conveyed, furnished by him to the vendee, to aid in making a search, is competent evidence against the defendant as showing his claim of title, and this followed by proper evidence, showing that the title thus claimed is defective, makes out a *prima facie* case, putting defendant to proof of any other and better title, if any he has.

Under such a contract the vendee is not bound to accept a title resting upon adverse possession.

Where the vendor's title is defective, and the vendee upon ascertaining it refuses to take such title, and demands the return of the payments made upon the contract, and the vendor instead of ascertaining the objections and taking measures to cure the defects simply holds himself ready to convey such title as he has, and requests the vendee to accept it, giving him notice that he will be held for any loss; the vendee is not called upon to make any other or further tender, or offer of payment, in order to entitle him to recover back the money paid.

(Argued June 6, 1872; decided June 20, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

The action was brought upon a contract between the parties for the sale of certain premises situate in the city of New York, plaintiff claiming the right to disaffirm the contract, and asking to recover back a payment made thereon and expenses incurred, on the ground that defendants could not make a good title to the premises.

Statement of case.

The objections to the title are confined principally to a narrow strip or alley, about twelve feet wide, running diagonally across the lower part of the lots in question.

James A. Stewart died about the year 1813, having made a will, seized of this strip of land. Sarah Stewart, his widow, died soon after her husband, leaving their two sons, John James Stewart and William James Stewart, surviving.

William James Stewart, on the 19th day of November, 1821, executed a paper purporting to be a deed of assignment to John L. Norton, Walter F. Osgood and John James Stewart. At the time of the execution of this deed Stewart had a wife who did not join. Stewart is deceased, leaving his widow surviving.

In the year 1839 Walter F. Osgood executed an instrument assigning all his right, title and interest in all the premises covered by the last mentioned assignment to John James Stewart.

John L. Norton in the year 1839 executed a paper declaring his non-acceptance of the trust, and relinquishing all manner of claim thereto.

Previous to the execution and recording of the last two mentioned papers in the year 1826, by deed dated October 14, 1826, the said John James Stewart and his wife executed a deed to Francis Dubuar of the strip of land in question. And thence through various mesne conveyances the title came to defendant, Sarah James.

The referee found the title defective in that the deed from John James Stewart to Dubuar was void as to the interest of William James Stewart in consequence of the non-joinder of the co-trustees; that the outstanding dower right of the widow of William James Stewart made the title defective.

Upon the trial plaintiff offered in evidence a copy of an abstract of title furnished him by counsel of defendant to aid in the search. The original was returned, and notice was served upon defendants to produce it. The copy was received under objection. Other questions upon the evidence appear in the opinion.

Statement of case.

A. J. Parker for the appellants. Schofield had a perfect title to the strip of land by adverse possession. (*Humbert* v. *Trinity Church*, 24 Wend., 587; *La Fromais* v. *Jackson*, 8 Cow., 589; *Livingston* v. *Peru Iron Co.*, 9 Wend., 511; *Bradstreet* v. *Clarke*, 12 id., 602.) The dower right of the widow of W. J. Stewart was barred. (3 R. S., 5th ed., 33, § 18; *Brewster* v. *Brewster*, 32 Barb., 428; Code, § 78.) The *onus* of proving the title bad rests with the plaintiff. (*Dowdall* v. *Camp*, 11 John., 451, 525; 13 John., 359; 14 id., 363; *Lawrence* v. *Taylor*, 5 Hill, 107.) The grantor being in possession, is presumed to be the owner, and the grantee cannot refuse his deed without showing title out of him. (Voorhies' Code, 8th ed., 93; *Miller* v. *Garlock*, 8 Barb., 153; *Carey* v. *Goodman*, 22 N. Y., 174; *Blank* v. *Aitkin*, 15 Wend., 522; *Hill* v. *Draper*, 10 Barb., 445.) An offer to perform and a demand of a deed according to the contract were indispensable to plaintiff's right of action. (*Van Benthuysen* v. *Casper*, 8 John., 257; *Hudson* v. *Swift*, 20 id., 27; *Green* v. *Green*, 9 Cow., 46; *Robert* v. *Montgomery*, 20 John., 15; *Sage* v. *Ramsay*, 2 Wend., 532; *Greenby* v. *Cheever*, 9 John., 126; *Harrington* v. *Higgins*, 17 Wend., 376.)

Geo. W. Stevens for the respondent. No power of sale or right to collect rents, issues or profits being vested in the executors, they took no fee. (*Brewster* v. *Striker*, 2 Comst., 19; *Chittenden* v. *Fairchild*, 41 N. Y., 289; *Quinn* v. *Skinner*, 43 id., 99.) An objection to admitting in evidence an instrument must define the precise grounds of objection. (*Norman* v. *Wells*, 17 Wend., 136; *West Point Iron Co.* v. *Reymert*, 45 N. Y., 703.) A widow has her whole life in which to bring her action of dower. (Laws of 1806, 616; 1 Rev. Laws 1813, 60; *Stewart* v. *Smith*, 14 Abb., 75.) Where a power in trust is vested in two or more, all must execute although one may have renounced. (*Champlin* v. *Parish*, 3 Edw., 581; *Dominick* v. *Michael*, 4 Sand. S. C. R., 374; *Roome* v. *Philips*, 27 N. Y., 357; *Thatcher* v. *Candee*, 33 How. Pr. R., 145.) The possession of S.'s tenant was not an adverse

possession as against the heirs-at-law. (*La Fromais* v. *Jackson*, 8 Cow., 589; *Livingston* v. *Peru Iron Co.*, 9 Wend., 511.)

ALLEN, J. I am of the opinion that the copy of the abstract of title was not competent evidence of the several conveyances mentioned in it or of the title, to the premises in question. The original was handed to the plaintiff's counsel as a memorandum or abstract of title, to aid him in making a search in the proper offices, and was competent as showing the claim of title by the defendants. This, followed as it was by proper evidence, and the introduction in evidence of the several conveyances, and showing that the title thus claimed was defective as to a portion of the premises which the defendants had agreed to convey to the plaintiff, made a *prima facie* case against the defendants, and put them to proof of any other or better title, if any they had. This was probably the only effect given to it by the referee.

It is suggested that there is no other evidence of several of the conveyances found by the referee, but if that be so and they be stricken out, the only effect will be to leave the title of the defendants defective as to other parts of the premises. Those conveyances are in aid and support, and not in impeachment of the defendants' title, and no prejudice could possibly have come to the defendants by regarding those conveyances as in evidence. It must be borne in mind that both parties gave such evidence as was within their reach in respect to the title. The plaintiff made a *prima facie* case by showing the title apparently defective, and such as he was not bound to accept under the agreement, and the defendant gave such evidence as he could in support of the title, and it was upon the whole evidence the referee pronounced. So, too, the certificate of the proof of the deed from William James Stewart to John James Stewart, Norton and Osgood was probably defective, but if that is stricken out, a principal link in the chain of the defendants' title is broken, and they are in a worse condition than if the deed had not been in evidence.

If it had been excluded, the plaintiff might have claimed that the title was hopelessly defective. The witness by whom the deed was proved did not state upon his examination that he subscribed the deed at the time of its execution or delivery as a witness thereto or that he knew the grantor therein, and in those respects the certificate was defective and the exemplification of the record was not competent evidence. (1 R. L., 369, § 1; *Henry* v. *Bishop*, 2 W. R., 575; *Hollenback* v. *Fleming*, 6 Hill, 303; *Jackson* v. *Osborn*, 2 W. R., 555; *Same* v. *Gould*, 7 id., 364; *Rogers* v. *Jackson*, 19 id., 383.) But the defendants have sustained no damages and the result of the action has not been affected by the admission of this deed in the abstract of title, and the rule is well settled that when the court can see that the party has not been prejudiced by the erroneous admission of evidence, it will not be cause for reversal of a judgment. There were probably some concessions or some evidence upon the trial which is not spread upon the record. Some of the findings of the referee, of which there is no complaint, were without evidence, so far as appears by the record. But be that as it may, it is very evident that to a strip of land twelve feet in width, traversing diagonally the contracted premises, and being a part of the premises agreed to be conveyed, the defendants had no paper title, or such a paper title as was sufficient in the law, and the plaintiff was not bound to accept a title resting upon adverse possession, had such title been shown.

The defendants claimed upon the trial, and now insist that they had not been put in default by any proper tender or offer of performance by the plaintiff, or demand by him of a conveyance of the premises. The general rule is, that when the acts of the parties are to be concurrent, it is the duty of him who seeks to maintain an action for a breach of the contract, either by way of damages for the non-performance or for the recovery of money paid thereon, not only to be ready and willing to perform on his part, but he must demand performance from the other party. (*Tinney* v. *Ashley*, 15 Pick., 546.)

In this State the rule is, that he must also tender performance on his part. (*Hudson* v. *Swift*, 20 J. R., 24; *Robb* v. *Montgomery*, id., 15; *Green* v. *Green*, 9 Cowen, 46; *Sage* v. *Ranney*, 2 W. R., 532; *Greenby* v. *Cheevers*, 9 J. R., 126; *Fuller* v. *Hubbard*, 6 Cowen, 13.) The necessity of a formal tender or offer of performance by the one party, and a demand of performance by the other may be obviated by the acts of the party sought to be charged, as by his express refusal to perform, or by putting himself in a position in which performance is impossible. Mere defect of title in the vendor and a present inability to give such a title as the contract calls for, may not, in all cases and under all circumstances, dispense with a tender of payment and a demand of a conveyance by the vendee in order to entitle the latter to maintain an action for the money already paid, or to defend an action for the purchase-money, if the payment becomes due before a deed is to be given by the terms of the contract. Under some circumstances, the court will not hold a contract void by reason of the inability of the seller to make a perfect title, but will put the purchaser to a tender of payment and a demand of the deed, to the end that the seller may make his title good. (*Harrington* v. *Higgins*, 17 W. R., 376; *Green* v. *Green*, *supra*; *Greenby* v. *Cheevers*, *supra*.) If a seller of lands, by an executory contract of sale before the day of performance, gives notice of his intention not to perform, or absolutely refuses to perform, or on being applied to is unable to perform, or offers a defective title, a formal tender and offer of payment and demand of a deed by the purchaser is not necessary to entitle him to treat the contract as rescinded, and recover back what he has paid thereon. (*Franchot* v. *Leach*, 5 Cowen, 506; *Lawrence* v. *Taylor*, 5 Hill, 107; *Foote* v. *West*, 1 Den., 544.) In *Foote* v. *West*, the title offered was a perpetual lease, subject to rent, the vendor being entitled to a conveyance in fee simple, and it was held the vendee might sue at once on the contract.

Holmes v. *Holmes* (5 Seld., 525) was an action for the non-performance of a contract for the conveyance of real property,

and the vendor, on the day appointed for the payment of the price and the delivery of the deed, said he was unable to convey the premises free from incumbrance, and a formal tender of the money was waived. The action was sustained, although the plaintiff had averred a tender of coin.

Morange v *Morris* (3 Keyes, 48) was an action to recover the money that had been paid upon an executory contract for the purchase of lands in New York city, as upon a rescission of the agreement. The defendant had tendered a deed of conveyance sufficient in form, but the lands were incumbered by taxes and assessments which the defendant was willing to pay, but the plaintiff refused to accept the deed and brought his action, and was allowed to recover. In this case, by the defendant's own showing, the plaintiff after examining the title gave notice that he would not take the title to the property and demanded the repayment of his money, and the defendants, instead of ascertaining the objections and taking measures to cure the defects and obviate the objections, simply held themselves ready to convey such title as they had, and requested the plaintiff to accept it, giving him notice that he would be held for any loss. The referee has found, upon sufficient evidence, the title defective as to a part of the premises, and it follows that the plaintiff was not bound to part with his money for it, and was entitled to treat the contract as rescinded. Had the defendants at once, and as soon as the title was objected to, perfected their title and within a reasonable time tendered a good and sufficient deed of conveyance, they could have probably held the plaintiff to his contract, but this they omitted to do, and the plaintiff's right to recover cannot under such circumstances be disputed. The plaintiff was not called upon to make any other or further tender or offer of payment under the circumstances.

The judgment must be affirmed.

All concur.

Judgment affirmed.

Statement of case.

THE FIRST NATIONAL BANK OF BALLSTON SPA, Appellant, *v.* THE PRESIDENT AND DIRECTORS OF THE INSURANCE COMPANY OF NORTH AMERICA, Respondents.

In a survey which was referred to and made a part of a policy of fire insurance upon a paper mill, this inquiry was made, "Watchman: Is one kept in the mill or on the premises during the night and at all times when the mill is not in operation, or when the workmen are not present?" Answer: "Yes." On the day previous to the destruction of the property by fire, the personal property in the mill was levied upon by the sheriff, by virtue of an execution against the assured. The sheriff excluded the employes from the mill, took the keys and locked up the building. The deputy sheriff and one of the trustees of the assured remained in the office of the mill, about two rods from it, during the night, up to the time of the discovery of the fire, which occurred about 4 A. M., but they did not keep watch. In an action upon the policy,—*Held*, that the question and answer in the survey constituted a warranty, that the levy did not excuse from the obligation to perform it; that the deputy sheriff and trustee were not to be regarded as watchmen within the meaning of the policy, and that there being a breach of the warranty, plaintiff was properly nonsuited.

(Argued June 7, 1872; decided June 20, 1872.)

APPEAL from judgment of the General Term of the Supreme Court, affirming a judgment entered upon a nonsuit, directed upon trial at circuit. (Reported below, 5 Lans., 203.)

The action was brought to recover upon a policy of insurance issued by defendants, to the Pioneer Paper Company for one year, dated 18th December, 1868, and payable to the First National Bank of Ballston, to the extent of any claim or notes the bank may hold against the company. The following was the description of the property insured: "Five hundred dollars on their stone and frame paper mill, with slate, cement and shingle roof, situate on the Kayaderosseras, near West Milton, in the town of Milton, Saratoga county, N. Y. Reference being had to survey No. 86, on file in this office, which is hereby made a part of this policy, and $2,500 on fixed and movable machinery and fixtures, shafting, gear-

ing, belting, piping, and rotary and steam boilers contained therein."

The policy provided, that "if any application, survey, plan or description of the property herein insured is referred to in this policy, the same shall be considered a part of this contract and a warranty by the assured; and if the assured shall make any false representation as to the character, situation or occupancy of the property, or conceal any fact material to the risk, either in a written application or otherwise, * * * this policy shall be null and void." The survey contained the following question and answer:

"27. Watchman—Is one kept in the mill or on the premises during the night, and at all times when the mill is not in operation, or when the workmen are not present?" "Yes."

The property was destroyed by fire on the 4th of March, 1869. Other facts appear in the opinion. At the close of the testimony defendants' counsel moved for a nonsuit, which was granted.

W. A. Beach for the appellant. By operation of law the sheriff was substituted as watchman and the warranty substantially performed. (*Niblo* v. *Binsse*, 44 Barb., 54; S. C., 1 Keyes, 476; *People* v. *Bartlett*, 3 Hill, 570; *Jones* v. *Judd*, 4 N. Y., 441; *Baker* v. *Johnson*, 42 id., 126.) The warranty as to storing straw was not broken. (*Smith* v. *Mechanics' Ins. Co.*, 29 How. Pr. R., 384; *Harper* v. *Albany Mut. Ins. Co.*, 17 N. Y., 194, 198; *Hoffman* v. *Ætna Ins. Co.*, 32 id., 405, 410, 414; *Yates* v. *Madison Ins. Co.*, 5 id., 469; *Farmers' Ins. Co.* v. *Snyder*, 16 Wend., 481; *Rowley* v. *Empire Ins. Co.*, 36 N. Y., 550.) A wrongful or actual levy as to personal chattels would not avoid a policy of insurance on the ground of the termination of the interest of the insured when he retained possession. (*Phœnix Ins. Co.* v. *Lawrence*, 4 Metc. [Ky.], 9; *Phila. Ins. Co.* v. *Mills*, 44 Penn., 241; *Wood* v. *Colvin*, 5 Hill, 228.) The court erred in rejecting proof as to the purposes of and the instructions to the officer in making the levy. (*Mickles* v. *Hart*, 1 Den.,

548; *Armstrong* v. *Dubois*, 4 Keyes, 291.) The policy was not avoided by omitting to refer to the judgments or reality in the answer as to incumbrances. (*Rowley* v. *Empire Ins. Co.*, 36 N. Y., 550.)

A. J. Parker for the respondents. The survey being a part of the policy, any misstatement as to the character, etc., of the property is a warranty and avoids the policy. (*Le Roy* v. *Market Ins. Co.*, 39 N. Y., 90; approved, 45 N. Y., 80; *Ripley* v. *Ætna Ins. Co.*, 30 id., 136.) The property being levied upon by the sheriff, the policy became void. (*Rodgers* v. *Bonner*, 55 Barb., 9; *The Springfield Co.* v. *Allen*, 43 N. Y., 389.) There being judgments on the realty, the warranty was broken as to incumbrances. (*Egan v. Mut. Ins. Co.*, 5 Den., 326; *Somerset Ins. Co.* v. *McAnally*, 46 Penn., 41.) Parol evidence cannot be received to explain or alter any of the provisions of the policy. (*Ripley* v. *Ætna Ins. Co.*, 30 N. Y., 136; *Mayor* v. *Brooklyn Ins. Co.*, 41 Barb., 351; *La Motte* v. *Hudson River Ins. Co.*, 17 N. Y., 199; *N. Y. Gas-light Co.* v. *Mech. Co.*, 2 Hall, 108; *Jennings* v. *Chenango County*, 2 Den., 75; *Alsten* v. *Mechanics' Co.*, 4 Hill, 329; *Ill. Mut. Ins. Co.* v. *O'Neile*, Ill., 89; *Hovey* v. *Am. Mut. Co.*, 2 Duer, 554; *Glendale* v. *Protec'n Co.*, 21 Conn., 19.) The burden of proving compliance with an express warranty rests upon the assured. (*McLoon* v. *Commercial Ins. Co.*, 10 Mass., 472.) The agent who issued the policy, being at the time an agent of plaintiff, the policy was void. (*Bentley* v. *Col. Ins. Co.*, 17 N. Y., 423; *N. Y. Central* v. *Protection Ins. Co.*, 14 id., 85; *Rett* v. *Washington*, 41 Barb., 353; *Utica* v. *Toledo*, 17 id., 132.)

GROVER, J. Where a fire policy refers to a survey and declares that it shall constitute a part of the policy, the statements therein contained in regard to the situation, use and care of the property are to be regarded and construed as warranties. (*Le Roy* v. *The Market Ins. Co.*, 39 N. Y., 91; *Same Case*, 45 N. Y., 80; *Ripley* v. *The Ætna Ins. Co.*, 30 N. Y.,

136.) To produce this effect, the policy must not only refer to the survey, but it must be made a part of it, otherwise the statements contained therein will be construed as representations and not as warranties. (*The Farmers' Ins. and Loan Co.* v. *Snyder*, 16 Wend., 481.) Failure to comply with a warranty will bar a recovery in case of loss, whether the loss was caused by such failure or not. (*Cases, supra.*) In the present case the survey is made part of the policy. In the survey the following inquiry is made: "Watchman. Is one kept in the mill or on the premises during the night and at all times when the mill is not in operation or when the workmen are not present? Ans. Yes." This statement was promissory, but the rights and duties of the parties were the same under it as though it had been affirmative. (*Ripley* v. *The Ætna Ins. Co., supra.*) The proof was, that upon the day previous to the destruction of the property by fire, the sheriff levied an execution against the assured upon the personal property in the mill, and excluded their employes therefrom, took the keys and locked up the building. The counsel for the appellant insists that this act of the sheriff, being an act that it was his legal duty to perform, must be regarded as the act of the law, and cites authorities showing that when performance of a contract becomes impossible by the act of God or the law, performance will be excused. The answer to this, in the present case, is that it was the default of the assured in not paying the judgment that caused the issuing and levy of the execution. The levy does not, therefore, excuse it from the obligation to perform the warranty. The counsel further insists, that as the deputy sheriff and one of the trustees of the assured remained in the office of the company, a building about two rods from the mill, during the night and until the discovery of the fire, they should be regarded as watchmen within the meaning of the policy. But the testimony failed to show that they were such, or even so regarded themselves. That shows that they looked through the building twice in the evening, the last time about eleven o'clock, and then went into the office, laid down and dozed until about

Statement of case.

four o'clock, when the deputy sheriff turned over and discovered the mill in flames, the fire being so extensive as to render all attempts to save the building and property hopeless. It is clear that these persons never undertook with the assured to act as watchmen, and consequently incurred no liability to it for negligence in the performance of the duties of such employment. In case of a recovery in the action, the defendant would have no right by subrogation to any remedy against them upon that ground. This shows that they were not watchmen within the meaning of the warranty. The evidence shows a pretty clear case of negligence in the performance, had they undertaken that duty. The sheriff remained to protect himself from liability incurred by the levy. This made him liable in case the property was stolen, but not for its destruction by fire. What Comstock staid for, the case does not disclose. It does appear that he did not remain as watchman. That is sufficient in this case.

It appearing that there was a breach of the warranty to keep a watchman, the nonsuit was properly granted, and the judgment must be affirmed.

All concur.

Judgment affirmed.

WILLIAM PALEN, Receiver, etc., Appellant, *v.* JOSEPH C. JOHNSON, Respondent.

By the provisions of section 3 of the usury laws of this State (1 R. S., 772, § 3), the right of action of a borrower, who has paid usurious interest, for the recovery of the excess is terminated at the end of one year, and is then transferred to the officers named in section 4. (ALLEN and FOLGER, JJ., dissenting.)

(Argued February 23, 1872; decided June 20, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment entered upon a verdict.

Plaintiff was appointed receiver of the property of one Henry Bouge, in proceedings supplementary to execution.

Statement of case.

As such receiver he brought this action to recover various sums alleged to have been paid in excess of legal interest upon various usurious loans from defendant to said Bouge. The complaint contained eleven counts. The last count was to recover the balance collected by defendant, alleged to have been transferred to him by Bouge as security for a loan over and above the amount of the loan. The transactions set forth in the first ten counts occurred in 1859 and 1860. The action was brought in 1863. The defendant demurred to the first ten counts and denied the last, alleging a purchase of the note.

The demurrer was sustained upon argument at Special Term and the order was affirmed by the General Term. Upon the trial of the issue of fact, the court directed a verdict for the defendant.

George F. Comstock for the appellant. The right to recover back the money paid for usury by the judgment debtor to the defendant was capable of assignment, and vested in plaintiff as receiver. (Code of Procedure, §§ 298, 244; *Meech* v. *Stoner*, 19 N. Y., 26; *Porter* v. *Williams*, 9 id., 142; *Bosanquet* v. *Dashwood Cas Temp*, Talbot, 37.) The right of action to recover money paid as usury existed at common law, and the limitation is six years. (*Wheaton* v. *Hibbard*, 20 John., 290; *Porter* v. *Mount*, 41 Barb., 561; *Palmer* v. *Lord*, 6 John. Ch., 95; *Meech* v. *Stoner*, 19 N. Y., 26; *Schroeppell* v. *Corning*, 2 Seld., 107, 115, 118; S. C., 5 Den., 236, 241; *Smith* v. *Bromley*, 2 Doug., 696; *Dey* v. *Dunham*, 2 John. Ch., 191; *Camp* v. *Bates*, 11 Conn., 500; *Tregoning* v. *Altenburg*, 8 Bing., 97; *Bosanquet* v. *Dashwood Cas Temp*, Talbot, 37; *Barrow* v. *Rhineland*, 1 John Ch., 550.) The objection as to limitation can be taken by answer only, and not by demurrer. (Code, § 74; 10 How. Pr. R., 383; 23 id., 140; 36 Barb., 628; 16 How. Pr. R., 546.)

John H. Strahan for the respondent. The facts alleged are not sufficient in law to constitute a cause of action. (*Dix*

v. *Van Wyck*, 2 Hill, 522, 524; *Seymour* v. *Marvin*, 11 Barb., 80; *Mumford* v. *Am. Lf. Ins. and T. Co.*, 4 N.Y., 485; *Boughton* v. *Smith*, 26 Barb., 639; *Curtis* v. *Leavitt*, 15 N. Y., 153–4, 229; *Butterworth* v. *O'Brien*, 23 id., 277; *Meech* v. *Stoner*, 19 id., 26.)

Per CURIAM. The provisions of 1 R. S., 772, § 3, differ essentially from those of 1 R. L., 64. The latter act authorized the party paying usurious interest to sue for the excess, within one year after payment, *in an action of debt founded on that act*; and in default of such action by the party paying the usurious interest, any other person might, within one year after such default, sue for and recover it. Upon the language of that act it was held that the remedy which it gave was merely cumulative, and that the limitation of one year only applied to an action founded upon that act, leaving the common-law right of action in force. This construction was placed upon the ground that there were no words in the statute either expressly or impliedly negativing the common-law remedy. (*Wheaton* v. *Hibbard*, 20 Johns., 292; *Palmer* v. *Lord*, 6 J. Ch., 95.)

The language of the Revised Statutes (1 R. S., 772, § 3) is significant of an intention to change the law. It provides that every person who shall have paid excessive interest "may recover *in an action* against the person who shall have taken or received the same, and his personal representatives," the amount so paid "if such action be brought within one year after such payment or delivery." If such suit be not brought within the said one year, then, by section 4, the sum paid may be recovered by any overseer of the poor of the town, or superintendent of the poor of the county, in which the payment shall have been made.

The limitation of one year, contained in the former act (1 R. L., 64) is therein in terms applied to an action of debt, *founded on that act.* The right to bring that particular action was given for one year only. A new form of action was thus created which might be resorted to during one year;

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while a passenger upon one of defendant's ferry-boats. Plaintiff resided at Hoboken and was engaged in business in New York. On the 9th April, 1864, as defendant's ferry-boat landed at New York, plaintiff, with others, went on to the boat. He was met by the outgoing passengers and was crowded upon the string-piece separating the passage way from the carriage way. At that moment, as plaintiff's witnesses testify, the chainman, an employe of the defendant, withdrew the chain in front of the carts on board and directed the cartmen to drive out. The drivers following his directions urged their horses toward the bridge, which being about eight or nine inches higher than the level of the boat, the first horse attached to a heavily laden cart struck his feet against the step thus formed, and as a consequence fell. The shaft of the cart struck the plaintiff and crushed his leg. Other evidence appears in the opinion.

John K. Porter for the appellant. Plaintiff holds the burden of establishing that he was not, and defendant was, guilty of contributory negligence. (*Deyo* v. *N. Y. C. R. R. Co.*, 34 N. Y., 9; *Curran* v. *Warren Chemical Co.*, 36 id., 156; *Le Baron* v. *East Boston R. R. Co.*, 11 Allen [Mass.], 312.) Defendant was not guilty of negligence. (*Nicholson* v. *Erie R. Co.*, 41 N. Y., 524, 534; *Cornman* v. *Eastern R. Co.*, 4 H. & N., 781, 785, 787; *Toomey* v. *London R. Co.*, 27 L. J., part 2 [C. P.], 39, 40; *Beisiegel* v. *N. Y. C. R. R. Co.*, 40 N. Y., 15; 8 C. B. R. [N. S.], 573; 98 E. C. L., 566; S. C., 34 N. Y., 14; 10 Bos., 185; *Siner* v. *Gt. W. R. R. Co.*, L. R. Exch., 3, 150; *Ryan* v. *Roch. R. R. Co.*, 9 How. Pr., 455, 456.) Plaintiff contributed to the injury and he cannot recover. (*Grippen* v. *N. Y. C. R. R. Co.*, 40 N. Y., 51; *Griffin* v. *Mayor of N. Y.*, 9 id., 460; *Wilds* v. *H. R. R. R. Co.*, 24 id., 430; *Gonzales* v. *Harlem R. R. Co.*, 38 id., 443; see, also, *Skelton* v. *London R. R. Co.*, Law R., 2 C. P., 631; *Baxter* v. *T. and B. R. R. Co.*, 41 N. Y., 503; *Barker* v. *Savage*, 45 id., 193–195; *Hinds* v. *Barton*, 25 id., 551; *Ginnon* v. *H. R. R. Co.*, 3 Robt., 26.)

Opinion of the Court, per CHURCH, Ch. J.

D. Pratt for the respondent. Defendant is responsible if any exercise of care and foresight on its part could have prevented the injury. (*Egerton* v. *N. Y. and Harlem R. R.. Co.*, 35 Barb., 193; *Stokes* v. *Saltonstall*, 13 Peters, 181; *Bartlett* v. *Third Av. R. R. Co.*, 45 N. Y., 628; *Caldwell* v. *Murphy*, 1 Duer, 241; *Gonzales* v. *N. Y. and Harlem R. R. Co.*, 39 How., 407; *Bartlett* v. *Third Av. R. R. Co.*, 45 N. Y., 628; *Alden* v. *N. Y. Central R. R. Co.*, 26 id., 102; *Bowen* v. *N. Y. Central R. R. Co.*, 18 id., 408.) Defendant's motion for a nonsuit was properly denied. (*Stokes* v. *Saltonstall*, 13 Peters, 181, and cases cited; *Cried* v. *Hartman*, 29 N. Y., 591; *Wilds* v. *H. R. R. R. Co.*, id., 315; *Bernhardt* v. *The Ren. and Sar. R. R. Co.*, 32 Barb., 165; *Buel* v. *N. Y. Central R. R. Co.*, 31 N. Y., 319; *Ernst* v. *The Hudson River R. R. Co.*, 35 id., 9; S. C., 39 id., 61; *Cook* v. *N. Y. Central R. R. Co.*, 3 Keyes, 476; *Dickens* v. *Same*, 1 id., 23; *Jelter* v. *N. Y. and Harlem R. R. Co.*, 2 id., 154; *Gonzales* v. *N. Y. and Harlem R. R., Co.*, 39 How., 407; *Barret* v. *Third Ave. R. R. Co.*, 45 N. Y., 633, opinion by Judge ALLEN.)

CHURCH, Ch. J. The plaintiff was injured while a passenger on the defendant's ferry boat, to be carried from New York to Hoboken, and the jury have found that the injury was occasioned by the defendant's negligence; and that the plaintiff was guilty of no negligence which contributed to it; and the General Term of the Common Pleas, who had power to review the facts as well as the law, has affirmed the judgment.

This court is now asked to reverse the judgment upon both questions, viz., whether the defendants were guilty of negligence, and whether the plaintiff was free from it. We have no power, as the General Term had, to review the facts for the purpose of determining whether the verdict was against the weight of the evidence: and can only do this to ascertain whether there was any evidence in the case which could legitimately justify the verdict. If any view of the facts which

the jury would be justified in taking would warrant the conclusion arrived at by them, this court cannot interfere, although we might, if we had power to determine the question as a fact, arrive at a different conclusion.

These general rules are so well settled, and have been so often reiterated by this court, that it is quite unnecessary to cite authorities, and it seems almost superfluous to state them. It is equally well settled that a verdict without any evidence to sustain it, or against evidence, is an error in law which may be reviewed in this court; and we are called upon to look into the evidence in this case for the single purpose of ascertaining whether there are any facts proved upon which the jury could found their verdict. First, as to the negligence of the defendants. It is unnecessary to inquire whether the kind of bridge used was the safest and best adapted to the purposes of a ferry, or whether a float bridge is superior to a chain bridge; or whether a combination of both is not superior to either; or whether there should be two passage ways, one for ingress and the other for egress, so as to prevent crowding and jostling among passengers going into and coming out of the boat. The same rule is applicable to the defendant as to all other carriers of passengers, that the utmost care, skill and vigilance is to be exercised in all the machinery and arrangements connected with its boats, and in the management of them; and if any injury occurs in consequence of the neglect or failure to exercise such care, it is liable to the injured party. But the bridge used by the defendant, whether the best kind or not, was amply sufficient and perfectly safe if properly managed. The accident cannot be charged, legally, to the structure of the bridge. It did not fail in any way. Nor did the single passage way or its restricted dimensions, or the arrangements for passing on and off the boat, cause the injury; and I do not think the evidence in relation to any of these facts would establish the defendant's negligence, or justify a verdict against it. The charge of negligence rests upon the improper management of the bridge, and the premature

order for the carts and teams to drive off. It is claimed by the plaintiff that, before the bridge was adjusted to the level of the boat, and while it was seven or eight inches higher than the floor of the passage way, the chain was thrown down and the order given to the teams to "drive out;" and that a horse, attached to a cart heavily laden, in attempting to get on to the bridge, stumbled against it, and fell in a way which struck and broke the plaintiff's leg with the shaft of the cart. These facts are positively sworn to by one witness, substantially by another, and are partly corroborated by other evidence. The defendant insists that the bridge was properly adjusted on a level with the floor of the passage way, or as nearly so as was practicable, and that the injury was caused by the slipping of the horse on the wet plank, and not by the stumbling against the bridge left unadjusted by its employes; and evidence was given to establish these facts. The defendant may be right as a question of fact; but can we say that it is right as a matter of law, against the verdict of the jury and the opinion of the General Term? I know of no principle that would justify us in so determining. It is argued that the evidence of the plaintiff on this point is conclusively answered by the fact that the cart was subsequently run off by hand; that the boat and bridge were perfectly level at that time, and that no further adjustment of the bridge was made subsequent to the accident. If these facts were conceded they would, of course, establish that there was no discrepancy between the bridge and the boat at the time of the accident. If they were even five or ten minutes after, and had not been altered, they must have been level at the time.

A witness testified that the bridge was not adjusted after the accident, and no witness testified that it was; but is the fact, therefore, undisputed? It is not indispensable that the particular circumstance relied upon to prove a fact should be contradicted in order to dispute the fact itself. Two witnesses had sworn positively that there was a difference of eight inches between the boat and bridge at the time the horse fell,

and that evidence is in direct conflict with the circumstance sworn to by the witness, that the bridge was not adjusted after the accident. Assuming that the boat and bridge were on a level when the cart was run off by hand, the two facts above stated were in direct antagonism to each other. It is not a question of law to determine which fact was true. That was the province of the jury, and depended upon the credibility of the witnesses, their means of knowledge and the accuracy of their recollection. It is impossible to bring such a question within the range of questions of law. Other evidence, referred to in the argument, tends to prove that the horse slipped when he first started upon the wet deck, and that the bridge had no agency in his fall; but the jury has found against this evidence, and we are concluded by the finding.

It is argued in the elaborate brief of the learned counsel for the appellant that it was under no legal obligation to provide precautions against the possibility of horses slipping or stumbling and injuring a passenger, any more than the city would be liable for an injury by a horse stumbling in Broadway though the inequalities of the street. As a general rule, the city would be liable for an injury occasioned by the streets being out of repair; but there are exceptions and qualifications to this rule of liability which do not apply to the liability of the defendant.

It may be conceded that the defendant would not be liable for an injury by the slipping of a horse on the boat, which it had in no manner caused. The plaintiff was rightfully on the defendant's boat as a passenger, and it owed him a duty, not only to safely carry him, but not to injure him by any act of carelessness or negligence. The bridge was capable of adjustment with the boat, and should have been so adjusted before the order was given for the teams to pass off. To force a horse, attached to a heavily laden cart upon a slippery deck, to mount a perpendicular lift of eight inches was not only unnecessary, but, from the nature of the act, improper and dangerous. It was a careless, needless act,

likely to produce the result which followed to the horse; and if, in producing that result, the plaintiff was injured without his fault there is no principle which will relieve the defendant from liability. It is as liable for negligently causing a horse to fall on him as it would be for negligently causing a stick of timber or any article of freight, which was being removed from the boat, to fall on him. Upon the theory of the plaintiff, which the jury has adopted, the injury was the direct consequence of the defendant's negligent act. The case cited of *Common* v. *Eastern R. Co.* (4 H. & N., 781) is very different from this. There the plaintiff, either through his own carelessness or from being pressed by the crowd, fell against a portable weighing machine for weighing baggage, standing on the platform in plain sight; and the court held that there was no evidence of negligence to go to the jury; "the machine being in a situation in which it might have been seen, and the accident not being shown one which could have been reasonably anticipated." This would be an authority if the horse had slipped and fallen on the plaintiff without the negligent agency of the defendant at the time, or if the crowd had pressed the plaintiff against the stringer and injured him. It might be said that the general arrangement which made such an accident possible was not legal negligence on the part of the company; but the case has no application where the defendant's immediate negligence caused the act which produced the injury. Neither has the rule, laid down in *Cotton* v. *Wood* (98 Eng. C. L., 566), any application to the facts found by the jury in this case. There the facts were undisputed, and the court held that there was no proof of negligence against the omnibus driver, and, at all events, the negligence of the plaintiff could as well be predicated of the facts as of the defendant; and in such a case the plaintiff must fail.

King v. *Manchester R.* (12 Jur. [N. S.], 525) might have some bearing if the negligence in this case was based upon the restricted passage way. There was no evidence in that case that the platform was not perfectly safe for persons to

walk single file, and the court held that sufficient; and, besides, the court said that "drinking, no doubt, prevented the parties from exercising due care."

The case of *Bridges* v. *North So. R. Co.* (19 Weekly Reporter, 824) was where the plaintiff, upon the stopping of the train, from defective vision, stepped out of the car on to a heap of rubbish, mistaking it for the platform. The question was whether the calling out of the name of the station was an invitation to alight. The court held that it depended on circumstances, but that it was not an invitation to the passenger to shut his eyes and jump "in blind expectation of alighting on a platform of the usual construction;" but it has no special relevancy to any question in this case. *Ryan* v. *Rochester R. R. Co.* (9 How. Pr. R., 453), was decided upon the ground that the defendant was under no obligation to the plaintiff to build a fence.

No case has been cited that will relieve the defendant from the charge of negligence, and consequent liability, under the facts found by the jury in this case. Each case must be adjudged by its own circumstances, which are as various as the cases themselves; and sometimes a slight difference will vary the rule proper to be applied.

The question of contributory negligence is also urged as a question of law. There are acts done, or omitted to be done, which constitute negligence in law. A familiar instance is that of a person approaching a railroad crossing, who omits to look or listen for trains. Ordinary prudence and the exercise of that care which every person does and ought to feel for his own safety would naturally dictate the use of his senses, at least to avoid danger. If he does not he is careless and negligent. But this rule cannot be applied to this case. It cannot be claimed as a matter of law that the plaintiff was negligent in going to the boat, when he went according to the usual custom and course of business. The defendant had the power to regulate the manner of receiving and discharging passengers, and it cannot complain that the plaintiff acted in accordance with the rules and custom prescribed by it.

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(See *Keating* v. *N. Y. C. R. R. Co.*, 49 N. Y., 673.) Nor was it negligence in law to step upon the stringer to allow the outgoing passengers to pass. It was not necessarily or ordinarily a place of danger, and the plaintiff had no reason to apprehend such an accident as occurred. If, while standing there, he had been injured by an outgoing team, which he could have avoided by looking, he would have been guilty of contributory negligence. He had no more reason to anticipate the falling of this horse upon him than he would the falling of the flag-staff, and was not called upon to exercise any particular care to avoid it.

The judge properly submitted it to the jury as a question of fact whether, under the circumstances, he was in fault. No authority of any court can be found holding this to be error.

The other exceptions were not insisted upon, and none of them present any substantial ground of error.

The judgment must be affirmed, with costs.

All concur.

Judgment affirmed.

50	61
118	462
50	61
134	519

GEORGE SCHAFER et al. *v.* JOHN REILLY, CATHARINE M. BURCHARD, Respondents, and ALFRED L. GRIFFIN, Appellant.

One who takes an assignment of a mortgage, takes it subject not only to any latent equities that exist in favor of the mortgagor, but also subject to the like equities in favor of third persons.

A mortgage executed for the purpose of raising money thereon for the mortgagor, and without any delivery to or consideration being paid therefor by the mortgagee, only has life and validity from the time of its assignment and delivery to an assignee for value; and this transaction cannot have a retroactive operation so as to give effect to the mortgage at an earlier day, to the prejudice of others having rights, legal or equitable, existing at that time. Nor can these rights be effected or destroyed by any act or representation of the mortgagor.

Accordingly *held*, that where such a mortgage was executed and recorded and subsequently negotiated, but before its assignment and delivery

Statement of case.

another person acquired a lien upon the mortgaged premises, the latter lien had the priority; and this was so, although the assignee, before taking the assignment, required and obtained from the mortgagor an affidavit that the mortgagee advanced the whole sum of principal secured by the mortgage without abatement, and that there was no offset, defence or counter-claim thereto.

(Argued June 11, 1872; decided June 20, 1872.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, affirming an order of Special Term, which order confirmed referee's report in proceedings instituted under rule seventy-seven of the Supreme Court, to ascertain and report the amount due to the respondent herein, or to any other person, which was a lien upon the surplus moneys arising upon a foreclosure sale, and to ascertain the priorities of the several liens thereon. The parties to the appeal are Catharine M. Burchard, respondent, and Alfred L. Griffin, appellant, who are contesting claimants to the surplus.

The surplus moneys are claimed by the respondent under and by virtue of a mortgage made by one John Reilly to Peter Reilly, bearing date March 29, 1870, acknowledged April 21, 1870, and recorded April 22, 1870, and which said mortgage was assigned to the respondent by said Peter Reilly, by assignment, dated August 26, 1870, and the execution thereof proved by subscribing witness, August 27, 1870, and recorded August 29, 1870.

Before taking said assignment the respondent required and obtained from the mortgagor an affidavit that Peter Reilly, the mortgagee, had advanced to him the whole amount of the principal thereof, without abatement, that the whole of said sum then remained unpaid, and that there was no offset, defence or counter-claim to any part thereof.

Said surplus, claimed by the appellant, under and by virtue of a mechanic's lien filed against the mortgagor in the office of the clerk of Kings county June 7, 1870, and on which a decree was entered in favor of said appellant January 12, 1871.

Opinion of the Court, per ALLEN, J.

Justus Palmer for the appellants. No presumptions obtain, as to delivery of deed, where it is proved to have been in the hands of the grantor at a period subsequent to its date. (*Ellery* v. *Metcalf*, 1 Den., 323.) An acceptance is necessary to sufficient delivery. (*Jackson* v. *Phipps*, 12 Johnson, 418; 2 Abbott's Digest, 363.) Respondent takes the position of his assignor. (*Bush* v. *Lathrop*, 22 N. Y., 535; *Davies* v. *Austin*, 1 Ves., 24; *Mason* v. *Lord*, 40 N. Y., 487; *Reeves* v. *Kenball*, id., 311; *Berdan* v. *Sedgwick*, 44 id., 626.) It is the duty of the court, upon foreclosure, to provide for the equitable distribution of the surplus. (*Mut. Life Ins. Co.* v. *Bowen*, 47 Barb., 618.) The validity of the liens of contesting claimants may be determined. (*Mut. Life Ins. Co.* v. *Bowen*, 47 Barb., 618; 8 Abbott's Digest, 302.) An execution creditor asserting a lien on mortgaged chattels may impeach the mortgage. (2 Hill, 522; *Mason* v. *Lord*, 40 N. Y., 488; *Berdan* v. *Sedgwick*, 44 id., 626; *Dort* v. *Bank of Utica*, 8 Paige, 639.)

Isaac L. Miller for the respondents. The rule that the assignor of a chose in action takes, subject to existing equities, does not extend to equities residuary in an unknown third person. (*Murray* v. *Lylburn*, 2 J. Ch., 441, 443; *James* v. *Morey*, 2 Cow., 297.) An assignee of a *bona fide* purchaser is not prejudiced by notice of his assignor. (*Bush* v. *Lathrop*, 22 N. Y., 549; see *Redfean* v. *Ferrier*, 1 Dow., 50; *Bush* v. *Lathrop*, 22 N. Y., 548, 549; *Jackson* v. *Henry*, 10 John., 185; *Jackson* v. *Van Valkenburgh*, 8 Cow., 260; *Varick* v. *Briggs*, 6 Paige, 323; *Fort* v. *Burch*, 5 Denio, 187; *Trustees Union Col.* v. *Wheeler*, 59 Barb., 585.)

ALLEN, J. The parties to this appeal are contesting claimants to the surplus moneys arising from the sale of mortgaged premises under a judgment of foreclosure, upon which both had liens, and the only question is as to the priority of the respective claims.

The appellant, Griffin, claims as a lienor under chapter 335

of the Laws of 1853, giving to mechanics and others erecting buildings, performing work or furnishing materials therefor in the county of Kings, the right to a lien on the building and appurtenances, and upon the land on which the same shall stand, for the value of such labor and materials. The lien was perfected by filing the notice required by law in the office of the county clerk, on the 7th of June, 1870, and judgment was given thereon on the 12th of January, 1871. Neither the notice filed with the clerk of the county or the judgment roll in the action brought to enforce the lien appear in the record, but the referee has found the facts as stated, and no objection appears to have been taken upon the hearing to the validity of the lien or the regularity of the proceedings to assert it.

It is now claimed, upon a single expression in the testimony of the appellant, Griffin, that there could have been no lien under the statute. But it evidently was not the subject of contest upon the reference. The appellant was not examined as to the foundation of his claim, the statement and notice by which the lien was attempted to be created is not before us, and there is not enough in the record to enable us to pronounce understandingly upon the question now for the first time made. It must be assumed that a lien was created, valid in law, on the mortgaged premises on the 7th of June, 1870, in favor of the appellant, as found by the referee.

The respondent, Mrs. Burchard, claims as mortgagee, or rather as the assignee of a mortgage, in virtue of a mortgage by the owner of the premises, bearing date March 29, 1870, acknowledged April 21, recorded April 22, and assigned to the respondent August 27, of the same year. The mortgage bears date and was recorded anterior to Griffin's lien, but Mrs. Burchard acquired the title to it on a day subsequent to the creation of the lien.

The mortgagee named in the mortgage was one Peter Reilly, the father of the mortgagor, who never had possession of or title to it, and there was no consideration for the mortgage as between the mortgagor and mortgagee. The mort-

gage was made for the purpose of raising money thereon for the mortgagor and was assigned to Mrs. Burchard for that purpose, the mortgagor receiving the money paid therefor by Mrs. Burchard. The referee has found from the facts that the mortgage was recorded, and that the nominal mortgagee was made acquainted with the contents of the assignment when he executed the same, and that before taking the assignment Mrs. Burchard required and obtained from the mortgagor an affidavit (untrue in fact) that the mortgage was a valid security for the whole amount secured by it, and that the money was advanced by the mortgagee for it; and as a conclusion of law, that the bond and mortgage were delivered to the mortgagee before the purchase thereof by Mrs. Burchard. The fact of delivery at any time to the mortgagee was not found, but the reverse was clearly proved, and there was no attempt to prove that the mortgage was valid as security in favor of the mortgagee, or that any lien ever existed under it in his behalf. The mortgagor was by his representations estopped from disputing the validity of the mortgage in the hands of Mrs. Burchard.

As against him, Mrs. Burchard's rights were perfect. But the rights of Griffin and his lien could not be affected or destroyed by any act or representation of Reilly done or made after the lien was of record. He was no more affected by the acts of Reilly which would operate as estoppels *in pais* against him, than he would have been by an other act or deed of the same person. (*Berdan* v. *Sedgwick*, 44 N. Y., 626.)

The mortgagee never had at any time a lien upon the mortgaged premises, either as against the mortgagor or any other person claiming a lien thereon. He never had a claim that could have been enforced adversely to any one, and could have made no claim to the surplus moneys in controversy.

The lien of Griffin upon the premises was superior in law and in equity to any claim the mortgagee could have made under the mortgage.

Whatever vitality the mortgage has is by reason of the purchase of it by and the assignment to Mrs. Burchard.

As a security for any amount, or a lien for any purpose, it only has life and validity from that time, and that transaction cannot upon any principle have a retroactive operation so as to give effect to the mortgage at an earlier day to the prejudice of others having vested rights.

Legal and equitable rights of others, existing before and at the time, cannot be displaced or superseded by that transaction.

A mortgage or grant only takes effect from the time of delivery. (1 R. S., 738, § 138.) This mortgage first took effect by delivery upon the assignment to Mrs. Burchard. The fact that she was defrauded cannot affect the legal and actual condition of the mortgage as against third persons having legal and equitable claims upon or title to the mortgaged premises.

It is well settled that a seller or assignor of chattels or choses in action can give no other or better title than he himself has, and that the purchaser or assignee must be content to stand in his place and to accept his title. There are certain recognized exceptions to the rule, adopted from motives of public policy, either to promote the negotiability of commercial instruments or to prevent fraud, but this case is not within any of the exceptions.

A mortgage is not negotiable, and it is not pretended that Griffin, the appellant, is estopped by any act or representation, or that he is for any reason in a situation in which it would be a fraud or contrary to equity or good conscience for him to assert his rights as against the respondent, Mrs. Burchard.

One who takes an assignment of a bond and mortgage, as did Mrs. Burchard in this instance, takes it subject not only to any latent equities that exist in favor of the mortgagor, but also subject to the like equities in favor of third persons and strangers.

Mrs. Burchard has taken especial care to foreclose all equities of the mortgagor, and should he attempt a defence to the mortgage, he would be precluded under one of the exceptions

to the rule restricting the title which an assignee may acquire to the actual title of the assignee, adopted for the prevention of fraud. (*McNiel* v. *Tenth National Bank*, 46 N. Y., 325.) Eminent judges have pronounced in favor of a rule which would only subject the purchasers of choses in action to the equities of the debtors, and which would give them rights as they apparently exist against third persons, but these views have not prevailed. *Bush* v. *Lathrop* (22 N. Y., 535), may be regarded as putting the question at rest in this State, and the decision well supported by the opinion of Judge DENIO, in which he reviews the cases bearing upon the question, and the dicta of the many judges who have alluded to the subject, commends itself as a just exposition of the law, as well upon principle as upon authority. He adopts the rule as expressed by Lord THURLOW, in *Davis* v. *Austin* (1 Ves., 247), "a purchaser of a chose in action must always abide by the case of the person from whom he buys."

This court applied the rule in the case cited, to one who had purchased a mortgage from an assignee under an assignment absolute in terms, but which was in fact made as a security for a smaller amount and in favor of the assignor, giving him the benefit of the latent equity existing in his favor resulting from the agreement between him and his immediate assignee, and of which the purchaser from him was entirely ignorant. The case has been repeatedly cited with approval, and full effect given to the principles there enunciated. (*Sheldon* v. *Edwards*, 35 N. Y., 279; *Thompson* v. *Van Vechten*, 27 id., 568; *Reeves* v. *Kimball*, 40 id., 299; *Ballard* v. *Burgett*, id., 314; *Mason* v. *Lord*, id., 476.) In the cases cited the rule was applied in cases circumstantially different, but all coming within the same general principle, and in all respect was had to latent equities of third persons and their equitable rights to property and to choses in action were protected as against the purchasers from those who had an apparent title and right to transfer, there being no fraud or culpable negligence on the part of the equitable claimant which could operate as an estoppel. See also *McNiel* v. *Tenth National*

Bank (*supra*), in which the cases are referred to and considered. There is no question here under the recording acts or in respect to a title originating in fraud. Doubtless a *bona fide* purchaser from one who has obtained a conveyance fraudulently, may, under some circumstances, hold as against the rightful owner, or a creditor, and a *bona fide* grantee, without notice of a prior unregistered deed, may hold, although his grantor may have taken title with full knowledge of such deed. Such are some of the cases cited and relied upon by the respondent. (*Jackson* v. *Van Valkenburgh*, 8 Cowen, 260; *Jackson* v. *Henry*, 10 J. R., 185; *Varick* v. *Briggs*, 6 Paige, 323; *Fort* v. *Burch*, 5 Den., 187.) The appellant Griffin had, prior to the legal existence of the mortgage of Mrs. Burchard as a security, acquired a legal lien upon the mortgaged premises, valid at law and in equity against the owner, and it was necessarily equally valid against any one who should subsequently acquire title from the owner. There was nothing to be done, to give publicity to the lien, that was *not* done, and no laches or fraud is chargeable upon the lienor in respect to it. Mrs. Burchard did subsequently acquire title to a mortgage upon the same premises, which she supposed had precedence and priority to Griffin's lien, or rather supposed was a valid security from its date, which was anterior to the lien of Griffin. But she was deceived and defrauded by those with whom she dealt, and without any fault of Griffin or act on his part conducing to the fraud or mistake. The delivery of the mortgage did not give it effect by relation as of the time of recording. She, in fact, acquired a lien by mortgage subsequent in point of time to Griffin's lien. Both liens were valid in law and in equity, and there was no equity in one over the other.

It follows that the maxim *qui prior est tempore, potior est jure*, must prevail. The appellant has the older and therefore the better title to the surplus moneys in controversy. He cannot be deprived of his lien by the fraud practiced upon the respondent. She took but the title which the mortgagee could by an assignment of the mortgage give, and that was to

Statement of case.

a mortgage taking effect by delivery at that time, and of course subject to all prior liens and existing equities of others.

The order of the General and Special Terms must be reversed, and an order granted directing the surplus moneys to be paid to the appellant, Griffin.

CHURCH, Ch. J., PECKHAM and RAPALLO, JJ., concur.

GROVER, J., concurs in result.

FOLGER, J., does not vote.

Ordered accordingly.

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SHERMAN D. PHELPS, Respondent, *v.* JOHN VISCHER, Executor, etc., Appellant.

Where one indorses a promissory note payable to another or order, prior to its delivery to the payee, in the absence of proof that he indorsed with intent to become surety for the maker to the payee, the legal presumption is that he stands in the position of subsequent indorsor; and the payee can neither maintain an action upon the indorsement, nor can he transfer a right of action thereon to a purchaser with notice, except upon assuming the responsibility of first indorser.

A general finding of a referee, like a general verdict, is controlled by a special finding of fact.

(Argued June 12, 1872; decided June 20, 1872.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, reversing a judgment in favor of defendant entered upon the report of a referee and ordering a new trial.

The action was brought upon a promissory note made by Scudder & Redfield, dated May 15, 1867, payable to the order of James E. Brown, and before delivery to Brown, indorsed by Solomon Bennet, defendant's testator. Before the note fell due Brown transferred the note to one Hine, and Hine transferred it to plaintiff absolutely, without condition, before due, for value paid at the time in money.

At the time of the transfer to the plaintiff the note had on it the following indorsement of Brown written above Bennet's indorsement:

Statement of case.

"For the purpose of making this note negotiable I indorse the same, payable to the order of Solomon Bennet, without recourse to me as indorser.

"JAMES E. BROWN."

The referee found "that, at the time of such transfer to the plaintiff, he knew nothing of any defence to the note." Also, "that said plaintiff had notice, before he purchased the note, that the indorsements made by the said Brown upon the note were made after it passed into the hands of Brown, with Bennet's indorsement upon it," and decided that the plaintiff could not recover.

Judgment was entered, upon the report of the referee, in favor of the defendant. Further facts appear in the opinion.

Amasa J. Parker for the appellant. Plaintiff could not recover without showing that defendant's testator indorsed the note with intent to become surety for the payee to the maker. (*Herrick* v. *Camean*, 12 J., 159; *Moore* v. *Cross*, 19 N. Y., 230.) The legal presumption, upon the face of the paper, is that defendant only assumed the liability of second indorser. (*Tillman* v. *Whalen*, 17 J., 326, 329.) The payee not having assumed the responsibility of first indorser, defendant is not liable. (*Bacon* v. *Burnham*, 37 N. Y., 614.)

G. W. Hotchkiss for the respondent. The note having been delivered to Brown, the payee, indorsed by defendant, Brown had the right to treat defendant as surety, and to indorse the note without recourse. (*Moore* v. *Cross*, 19 N. Y., 227; *Hall* v. *Newcomb*, 7 Hill, 416; *Essex Co.* v. *Edwards*, 12 Gray, 273; *Beckwith* v. *Angell*, 6 Cow., 315; *Blatchford* v. *Miliken*, 35 Ill., 439; *Richards* v. *Warring*, 1 Keyes, 576; *Cromwell* v. *Birdsall*, 40 N. Y., 491; *Griswold* v. *Robinson*, 10 Barb., 462; *Penny, survivor, etc.*, v. *Innes*, 1 C. M. & R., 439; *Dean* v. *Hall*, 17 Wend., 214; *Waterbury* v. *Sinclair*, 23 Barb., 455.) Plaintiff is entitled to recover as a purchaser in good faith. (*Magee* v. *Badger*, 34 N. Y., 249; *Steenhart* v. *Boker*, 34 Barb., 443; 1 Par. on Notes, etc., 288; *Griggs*

v. *Howe*, 2 Keyes, 581; *M. Bank of W.* v. *Foster*, 44 Barb., 90.)

GROVER, J. The order of the General Term does not state that it was made upon any error of fact. It must, therefore, be assumed by this court that the judgment was reversed and a new trial granted upon legal errors only. An exception was taken by the respondent to the finding by the referee of the fact that the plaintiff had notice, before he purchased the note, that the indorsements made by Brown upon the note were made after it had passed into the hands of Brown with Bennet's indorsement upon it. This exception raises the question in this court whether there was any evidence in support of the finding. The plaintiff, in his testimony, speaking of these indorsements, says: "I can't say when they were put on; it was done, that is, both of these instruments, signed by Brown, during the negotiation of the sale of the note to me. Hine brought all the notes to me to sell them to me." The witness had before testified that he purchased several other notes of Hine at the same time he bought this. Other testimony shows that Bennet's indorsement was put upon the note a long time before the purchase by the plaintiff. It follows that when the plaintiff first saw the note it had been indorsed by Bennet and not by Brown. This sustained the material part of the finding. Whether the note had been in Brown's hands was not material; but if so, that fact might be inferred from the testimony. This brings us to the real question in the case, which is whether the legal conclusion of the referee, from the facts found, that the plaintiff was not entitled to recover against Bennet, was correct. The substance of the facts so found is that Scudder & Redfield made the note in suit payable to the order of James E. Brown, and, after being indorsed by the defendant Bennet, was by them delivered to Brown the payee. That the note, before maturity, was transferred by Brown to one Hine; and by Hine, before due, transferred to the plaintiff absolutely, without condition for a valuable consideration. That at the time of

the transfer to the plaintiff he knew nothing of any defence to the note; and that it then had on it, in addition to the indorsement of Bennet, the following indorsement, made by Brown, written above the indorsement of Bennet, viz.: "For the purpose of making this note negotiable I indorse the same, payable to the order of Solomon Bennet, without recourse to me as indorser;" and the following, written below the indorsement of Bennet: "For value received of Isaac N. Hine I hereby guarantee to the said Hine, or bearer, the collection of the within note of the makers, and Bennet, the indorser," signed by Brown. That the plaintiff had notice, before he purchased the note, that the indorsement made by Brown upon the note was made after it had passed into the hands of Brown with Bennet's indorsement upon it. There would, at first view, appear to be an inconsistency between the finding that the plaintiff, at the time of his purchase, knew of no defence to the note, and the one in substance, that he did, at that time, know that the note, after being made and indorsed by Bennet, was, by the maker, delivered to Brown, who, after that, made his indorsements upon the note, provided the latter finding constituted a defence for Bennet upon the note, as held by the referee. Be this as it may, full effect must be given to this latter finding upon the same principle that a general verdict is controlled by a special finding of fact. From this finding it appears that the plaintiff did know that the note had been indorsed by Bennet before Brown made the special indorsement thereon. This presents the questions whether Brown, had he retained the note, could have recovered against Bennet as indorser; and if not, whether he could transfer any such right to a purchaser from him. In *Herrick* v. *Carman* (12 Johnson, 159) it was held that the payee of a note, made payable to his order, and indorsed by a third person previous to its delivery to the payee, could not recover against such indorser; that the face of the paper showed that the payee occupied the position of first indorser as to the one previously indorsing, and could not, therefore, be permitted to recover against one in the position as to him of

second indorser. In *Herrick* v. *Carman* (10 John., 224) it was held, upon a like note, that the party who had so indorsed might, in an action against him by an indorser of the payee, show that the plaintiff held the note as agent of the payee; and that this fact would defeat a recovery for the reason that the payee, as to the defendant, stood in the position of first indorser, and could not therefore recover of him. In *Tillman* v. *Wheeler* (17 John., 325) the same rule was held and applied in deciding the case. It may be remarked that in each of these cases it appeared that the payees received the notes from the makers for value, pursuant to an agreement by the maker to give notes with an indorser; but it was held that this fact was of no avail to the plaintiffs, unless it was further proved that the person indorsing did so with intent to become surety for the makers to the payees. It is clear that a party having no right of action upon a note himself can transfer none to another knowing all the facts. In the present case the plaintiff not only himself knew the facts, but the case shows that they were also known to Hine, of whom he purchased the note. In *Moore* v. *Cross* (19 N. Y., 227) the doctrine of the above cases was approved; and it was further held that in case the payee of a note, indorsed by a third person before delivery to him, averred and proved that it was the intention of the indorser to become surety of the maker to him upon the note, and that he indorsed the same for that purpose, he could maintain an action and recover upon such indorsement. There is no intimation that the action could be maintained in the absence of such proof. In *Bacon* v. *Burnham* (37 N. Y., 614) it was held, that where a person indorsed a note, payable to another or order, the legal presumption was, from the face of the paper, that he stands in the position of a subsequent indorser to the payee; and that in the absence of proof, showing him in a different position, the payee could not recover against him; and further, that the payee having no right of action, none could be acquired by transfer from him. This is decisive of the present case. The counsel for the respondent invokes the

rule that the right of a purchaser of negotiable paper is not impaired unless he has such knowledge of the equities between the original parties as to make his purchase dishonest. It is obvious that this does not include defences apparent upon the face of the paper, but such only as are dependent upon the proof of other facts. In the present case the plaintiff knew that Brown had not indorsed the paper without recourse to Bennet, but that the latter had indorsed it, payable to the order of Brown. The plaintiff must be assumed to have known that, in the absence of proof that Bennet indorsed with the intention of becoming security for the makers to Brown, Brown could maintain no action against him upon the indorsement, and, having no such right himself, could not transfer it to another except upon assuming the responsibilty of first indorser as to him; that the transfer of the note by Brown otherwise was a fraud upon Bennet. Had the plaintiff purchased the note of Hine without the knowledge that Bennet first indorsed the note, and that Brown's indorsement was made thereafter, the case would have come within the rule insisted upon by counsel. The plaintiff, in the absence of such knowledge, might have supposed that Brown first specially indorsed the note to Bennet, and that he subsequently indorsed; and that Brown's guaranty was made still later, upon some other arrangement. Under such circumstances the plaintiff would have been a *bona fide* holder. The cases cited by counsel, where notes, not negotiable, were indorsed before delivery, have no application. But in these it was proved that the indorsements were made with the intention of becoming security for the makers to the payee. In *Dean* v. *Hall* (17 Wend., 214), where it was held that the indorser could only be made liable when properly charged as such, and not as maker, the additional views found in the opinion are entirely predicated upon the assumed fact that the indorser put his name on the back at the time the note was made, according to a promise to become originally and directly responsible, or was privy to the consideration of the note. *Penny* v. *Innes* (1 Cromp-

ton, Meeson & Roscoe, 439), cited by counsel, was a case upon an indorsement of a bill of exchange, and the indorser was held liable upon the ground that the indorsement was equivalent to the drawing of a new bill by the indorser upon the drawee. If this be so the judgment was correct, as the drawer of a bill is liable to the payee unless it is paid by the drawer, and the proper steps are taken to charge him. This case has been criticised. (See *Gwinnell* v. *Herbert*, 5 A. & E., 436.) But it is unnecessary to determine in this case whether the point was well decided or not, as the reason of the decision has no application to the indorsement of a note payable to the order of the payee. As we have seen already, the law is settled in this State that such an indorser is not liable to the payee upon the face of the paper, and can only be made so by proof, showing that he indorsed with intent of becoming so liable. Bennet could not be made liable as the maker of a new note, but only as indorser. (*Hall* v. *Newcomb*, 3 Hill, 233; same case in error, 7 Hill, 416; *Brown* v. *Curtiss*, 2 N. Y., 225.)

The judge at General Term fell into the error of supposing that the facts set out in the complaint, bringing the case within the principle of *Moore* v. *Cross*, were admitted in the answer. The answer explicitly denies that the defendant Bennet indorsed with intent to become liable as surety to the payee.

The order of the General Term must be reversed, and the judgment entered upon the report of the referee affirmed, with costs.

All concur, except RAPALLO, J., not voting.

Order reversed and judgment accordingly.

Statement of case.

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ARCHIE LONG, Respondent, v. THE NEW YORK CENTRAL RAILROAD COMPANY, Appellant.

Where a shipper of property takes from the carrier a bill of lading, receipt or other voucher expressing the terms and conditions upon which the property is to be transported, the writing, in the absence of proof of fraud or mistake, must be taken as the evidence, and the sole evidence, of the final agreement of the parties, and by it their duties and liabilities must be regulated. Resort cannot be had to prior parol negotiations to vary its terms.

(Argued June 12, 1872; decided June 20, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiff entered upon a verdict.

This action was brought against defendant as a common carrier for an alleged refusal to deliver 500 empty pork barrels received from plaintiff at Buffalo, under an agreement to transport to and deliver to plaintiff at New York.

In November, 1866, plaintiff's agent purchased at Buffalo, 500 empty pork barrels. He negotiated with defendant's agent for their transportation to New York, and, according to his testimony, such agent agreed to transport them for sixty cents per 100 pounds, actual weight. Miles Jones & Sons, from whom they were purchased, delivered them to defendant a day or two after, taking a receipt, by which defendant agreed to transport the barrels from Buffalo to Albany, and thence forward to New York; "freight to New York, sixty cents per 100 pounds at estimated weight." The receipt was sent to plaintiff at New York. It was proved that the words "estimated weight," as used, meant that each barrel was estimated to weigh 100 pounds. The barrels averaged forty pounds each. Defendant transported them to Albany, and thence forwarded them to New York. Plaintiff produced the receipt and demanded the barrels, offering to pay the freight at sixty cents per 100 pounds, actual weight. Delivery

was refused unless he would pay sixty cents per barrel. Other facts appear in the opinion.

Charles S. Fairchild for the appellant.

Livingston K. Miller for the respondent. It was a proper question for the jury whether the contract, under which the goods were shipped, was verbal or in writing. (*Marshall* v. *N. Y. C. R. R.*, Albany Law Journal, February 3, 1872, p. 74; *Bostwick* v. *B. and A. C. R. R.*, 45 N. Y., 712; *Cary* v. *N. Y. C. R. R.*, Court of Appeals, April, 1871.)

ALLEN, J. There was a conflict of evidence as to the contract for the carriage of the barrels so far as the same rested in parol, and depended upon the verbal negotiations and understanding of the agents of the respective parties. The witnesses differed widely in their recollection and version of the terms of the proposal made by the one party and assented to by the other; and the disagreement of the witnesses was in respect to the freight, an essential and material part of the agreement. If the rights of the parties depend upon the agreement, thus made and consummated by the verbal negotiations of the actors, the verdict of the jury is conclusive upon this branch of the case, and the contract must be assumed to be that which the jury, by their verdict, have found it. The contract is one which is ordinarily reduced to writing before or at the time its performance is entered upon. Goods are seldom transported by common carriers except under an agreement evidenced by a written instrument in some form. The shipper of property, either by land or water, ordinarily takes from the carrier a bill of lading, receipt or other voucher acknowledging the receipt of the goods, and the purpose for and the terms and conditions upon which they are received. The evidence in this case accords with what, from experience, may almost be assumed to be the universal custom of common carriers, to wit, that freight is always carried by this defendant under a written contract. The evidence

is that at the time the barrels were received by the defendant a receipt was given to the party delivering them, expressing the terms of the contract, and that this receipt was presented by the plaintiff at the time he demanded the property. The property was delivered to and the receipt or contract accepted by the party representing the plaintiff, who at the time requested the defendant's agent to take it at a lower rate, which was refused. This testimony on the part of the defendant is unexplained and uncontroverted by the plaintiff. The verbal contract was merged in the written agreement, and the latter must be taken as the evidence, and the sole evidence, of the final and deliberate agreement of the parties. If it did not embody truthfully the terms of the agreement as actually made, the plaintiff or his agent should not have received it or assented to the carriage of the property under it; if accepted by the agent by mistake, that fact should be shown. But at the time of the receipt of the goods, and the delivery of the shipping receipt or contract for the carriage, the parties were in a situation to correct any mistake or misunderstanding as to the terms of the verbal agreement, and definitely adjust its terms. The one could retain his property or ship by some other carrier, and the other could refuse to accept the goods for carriage except upon such terms as should be agreed to. All prior negotiations and agreements were superseded by the formal written agreement; and by it, and it alone, in the absence of mistake or fraud, the duties and liabilities of the parties must be regulated.

Instead of relying upon the oral agreement of the defendant's agent, the plaintiff has elected to take the express written agreement of the party; and this agreement is perfect as a contract for the carriage of the goods, embracing all essential particulars. The rule that when a contract is reduced to writing recourse must be had to the instrument to ascertain its terms, and that resort cannot be had to prior negotiations to vary its terms, and that everything resting in parol becomes thereby extinguished, was applied to a contract for

the sale of a ship in *Mumford* v. *McPherson* (1 J. R., 414); to a bill of lading in *Creery* v. *Holly* (14 W. R., 26); to a charter of a vessel in *Renard* v. *Sampson* (2 Kern., 561); and to a contract for grading and paving streets in *Riley* v. *City of Brooklyn* (46 N. Y., 444). The rule was recognized in *Bostwick* v. *Baltimore and Ohio R. R. Co.* (45 N. Y., 712); but the case was taken out of the rule by the fact that the goods had been actually shipped under the verbal agreement, and the written agreement, or bill of lading, was sent to the shipper one or two days after the property had been shipped, and after the owner had lost the control of the goods and was in no situation to object to its terms. *Renard* v. *Sampson* (*supra*) is cited with approval in other cases which have been held not within the rule, for the reason that the part of the contract still resting in parol was separable and distinct from that part which had been reduced to writing. (*Witbeck* v. *Waine*, 16 N. Y., 532; *Barker* v. *Bradley*, 42 N. Y., 316.) Here the contract was entire and the written instrument was complete, making by itself a perfect contract, and was delivered and accepted by the plaintiff's agent at the time of the receipt of the goods by the defendant; and there are no circumstances in the case, as made, to authorize a resort to the prior verbal negotiations or agreement by the parties. The court held on the trial that the verbal contract was that by which the rights of the parties were to be determined, and the verdict passed against the defendant upon that ruling and the terms of the contract as it rested in parol and was found by the jury. This was erroneous, and entitles the defendant to a reversal of the judgment. By the parol contract, as claimed by the plaintiff and as found by the jury, the barrels were to be carried at a specified rate per hundred pounds actual weight; while, by the written contract, they were to be carried at the same rate "at estimated weight;" and the defendant proved that "estimated weight," as used in the contract, meant that each barrel was estimated to weigh 100 pounds. That this was the true meaning of the term, as there used, was not controverted upon the trial.

Statement of case.

The contest was, as to which contract should govern, the verbal or the written, and the plaintiff prevailed in excluding the written and establishing the verbal agreement as the contract of the parties. For this error the judgment must be reversed. Other questions of more or less importance and difficulty are presented; but as the facts may be essentially varied upon another trial they are not considered.

The judgment should be reversed and a new trial granted.

All concur.

Judgment reversed.

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HORACE K. THURBER, Appellant, *v.* PHILIP BLANCK, Respondent.

HORACE K. THURBER, Appellant, *v.* PHILIP BLANCK et al., Respondents.

It is not competent for a creditor to institute an action in order to make a proper case for issuing an attachment, or to place property in a situation to be subject to that process. The provisions of the Code, in reference to attachments (title 7, chap. 4, §§ 227 to 245), constitute a complete system for collecting debts in the cases and manner therein specified. The mode therein provided must be pursued; and unless property is so situated as to be attachable and convertible, according to these provisions, it cannot be attached.

Debts and choses in action are to be regarded, under the attachment laws, as legal assets, whenever the attachment acts directly upon a legal title; but when they are so situated as to require the exercise of the equitable powers of the court to place them in that situation, they are to be treated as equitable assets only. (GROVER, PECKHAM and FOLGER, JJ., dissenting.)

No authority is conferred to institute actions to reach mere equitable assets, or to bring in other parties for the purpose of attacking transfers of such property as fraudulent; that is the office of a creditor's bill, founded upon a judgment and execution.

Accordingly *held*, that an attaching creditor could not maintain an independent action, in the nature of a creditor's bill, to set aside an alleged fraudulent assignment by the debtor of a bond and mortgage which the sheriff had attempted to attach by leaving with the obligor a certified copy of the attachment, with notice.

Statement of case.

Also *held* (GROVER, PECKHAM and FOLGER, JJ., dissenting), that the sheriff had no authority to bring an action against the assignee for that purpose, and to subject the bond and mortgage to the operation of the attachment.

(Argued June 10, 1872; decided November 12, 1872.)

APPEAL from an order of the General Term of the Supreme Court in the first judicial department, affirming three Special Term orders, to wit: An order setting aside the judgment in the first above entitled action; an order, in the second action, setting aside an order appointing a receiver of a certain bond and mortgage, and an order dismissing the complaint in the second action.

The first action was brought upon a Wisconsin judgment, and an attachment was issued thereon against defendant as a non-resident. He formerly resided in this State and owned a house and lot in New York city. This he sold, receiving a bond and mortgage thereon for a portion of the purchase-price. These he assigned to one Peter Cook, who, on the same day, assigned them to Sophia Blanck, defendant's wife, and immediately thereafter defendant and wife left the State. It was claimed by plaintiff that the assignments were without consideration, and made with intent to defraud defendant's creditors.

By virtue of the attachment the sheriff attempted to levy upon the bond and mortgage by serving certified copies upon the obligors and mortgagors, with notice indicating the purpose to attach the same.

The summons in the action was served by publication, and on the 31st March, 1870, judgment was perfected therein against the defendant and execution issued thereon.

Thereupon plaintiff commenced the second action against Blanck, his wife, Cook, the mortgagors and others to set aside the alleged fraudulent assignment of said bond and mortgage, and to subject the mortgage to the lien of the attachment, and apply the same to the payment of this judgment. the said Philip Blanck and Sophia Blanck both still continuing non-residents of this State. Plaintiff obtained an *ex parte* order appointing a receiver of the bond and mortgage.

Statement of case.

Nelson Smith for the appellant. The assignment of the bond and mortgage being fraudulent was void, and they were liable to be attached the same as though the assignment was never made. (2 R. S., 5th ed., 224, § 1; *Rinckey* v. *Stryker*, 31 N. Y., 140; *Thayer* v. *Willet*, 9 Abb., 325; *Schussel* v. *Willet*, 12 id., 397; *Lawrence* v. *Bank of Republic*, 35 N. Y., 321.) The levy of the attachment was properly made, and by it plaintiff acquired a specific lien upon the bond and mortgage. (*Heye* v. *Bolles*, 2 Daly, 231; 35 N. Y., 320; 31 id., 140.) The subsequent judgment perfected his right to such lien, and entitled him to maintain an action to enforce it. (*Falconer* v. *Freeman*, 4 Sand. Ch., 565; *Heye* v. *Bolles*, 2 Daly, 231.) By the levy the property was kept as security for the judgment. (§ 227 of the Code; *Greenleaf* v. *Mumford*, 19 Abb., 469; *Rinckey* v. *Stryker*, 26 How. Pr., 75; S. C., 31 N. Y., 140; *Skinner* v. *Stuart*, 13 Abb. Pr., 442; *Heye* v. *Bolles*, 2 Daly, 231.) This and the fact that plaintiff's right was obstructed by the fraudulent assignment, entitled him to the relief sought in the second action. (*Heye* v. *Bolles*, 2 Daly, 231; *McElwain* v. *Willis*, 9 Wend., 561, 567; *Chatauque Co. Bank* v. *White*, 2 Seld., 552; *Beck* v. *Berdet*, 1 Paige, 305; *Crippen* v. *Hudson*, 3 Kern., 166.) The receiver was properly appointed. (*Lawrence* v. *G. F. Ins. Co.*, 1 Paige, 587; *Postman* v. *Mills*, 8 London Jur. [N. S.], 161; *Padmore* v. *Gunning*, 7 Simons, 485; 1 Barb. Ch., 664; 1 Hop. Ch., 429; 3 J. Ch., 48; *Ichings* v. *Breiven*, 4 Sand. Ch., 417; *People* v. *Norton*, 1 Paige, 17; *Gibbons* v. *Manwaring*, 9 Simons, 77; *Holmes* v. *Bell*, 2 Beavan, 298; Burnett on Receivers, 3; *Tarfield* v. *Irvine*, 2 Russell, 199.)

Benjamin A. Willis for the respondents. The statute giving jurisdiction as to non-residents must be strictly complied with as to every requirement in order to confer jurisdiction. (*Wallett* v. *Righters*, 13 How., 43; *Wortman* v. *Wortman*, 17 Abb., 66; *Cook* v. *Fearren*, 34 Barb., 95.) An order for publication and all proceedings thereupon are nullities, unless the case is, in fact, with section 135. (*Fisk* v. *Anderson*, 33

Barb., 71; *Peck* v. *Cook*, 41 Barb., 549.) An attachment can only operate upon the right of a debtor existing at the time it was made. (Drake on Attachment, § 458; *Marvel* v. *Whitman*, 19 Ala., 135, and other cited cases.) The bond and mortgage cannot be separated from the mortgage debt. (*Jackson* v. *Willard*, 4 John., 41; *Blanchard* v. *Colborn & Cox*, 11 Mars., 146; *Purdy* v. *Huntingdon*, 42 N. Y., 346.) To authorize the appointment of a receiver, apparent title to the property must appear; it must be subject to the action, and in danger; these are all wanting here. (*Lloyd* v. *Passingham*, 19 Vesey, 59; *Mordaunt* v. *Hooker*, 1 Amb., 311; *Earl of Fingal* v. *Blake*, 2 Molloy, 50; *Smith* v. *Smith*, 2 Younge & Collyer, 357; 1 Van Santford, Equity Pr., 293; *Brooks* v. *Stone*, 11 Abb., 220; *Hamilton* v. *A. & T. Co.*, 3 id., 255; 7 Simmons, 485; 1 Barb. Ch., 664; 1 Hopkins, 429; 3 John. Ch., 48; *Kemp* v. *Harding*, 4 How., 178.) The second action cannot be sustained as a creditor's bill, as it appears the legal remedy is not exhausted. (*Brooks* v. *Stone*, 11 Abb. 210; *Mills* v. *Block*, 30 Barb., 549.)

CHURCH, Ch. J. This court, in *Rinchey* v. *Stryker*, reported in 26 How. Pr. R., 75, decided that a sheriff holding an attachment had a right to seize personal chattels which had been disposed of by the debtor with intent to defraud creditors, and that when prosecuted by the claimant, that the sheriff may show before judgment in the attachment suit that the title of the purchaser was fraudulent and void against the attaching creditor, and that such creditor is not regarded as a creditor at large, but one having a specific lien upon the property attached. In *Lawrence* v. *The Bank of the Republic* (35 N. Y., 320), it was held that the proceeds deposited in a bank of property fraudulently assigned in the name of the fraudulent assignee, could not be attached as a debt due the assignor, and that the sheriff could not bring an action under the Code to recover such deposit or subject it to the attachment. In the Supreme Court the decisions upon this subject have been very conflicting. In *Mechanics' & Traders' Bank* v. *Dakin*

(33 How., 316), which was precisely such a case as this, it was held that although the creditor could not maintain an action to remove the fraudulent obstruction, the sheriff could bring an action to collect the bond and mortgage, and implead the fraudulent assignee. This decision was made after the decision in 35 N. Y., (*supra*), and in *Greenleaf* v. *Mumford* (50 Barb., 543), SUTHERLAND, J., expressed his surprise that the learned judge who delivered the opinion in 33 How. (*supra*), should have expressed his approval of the decision in the case of *Lawrence* v. *Bank of the Republic*, in the Court of Appeals, claiming that the latter decision was in conflict with that opinion, and other cases exhibit a similar diversity of opinion among learned judges who have had occasion to examine the questions presented on this subject. I do not deem it necessary to review these authorities, although many of the opinions are elaborate and able.

By the Code, the warrant of attachment requires the sheriff to attach so much of the real and personal estate of the debtor, including debts, credits and effects, as will be sufficient to satisfy the plaintiff's demand with costs, and subject to the direction of the court or judge, to collect and receive into his possession all debts, credits and effects of the defendant, and for that purpose may take such legal proceedings as may be necessary. (§§ 231, 232.) The attachment, if levied upon debts or other property incapable of manual delivery, is to be executed by leaving a certified copy of the attachment with the debtor or individual holding such property, with a notice of the property levied upon. (§ 235.) § 237, sub. 4, provides that until the judgment is paid, the sheriff "may proceed to collect the notes and other evidences of debt, and the debts that may have been seized or attached," and § 238 authorizes the plaintiff to prosecute any actions which the sheriff may prosecute upon giving the undertaking provided by that section.

It is very clear that the action commenced by the plaintiff in the nature of a creditor's bill cannot be sustained, and that the orders made in that action must be affirmed. The provisions of the Code constitute a complete system for collecting

debts in the cases and manner therein specified. The mode therein provided must be pursued, and unless property is so situated as to be attachable and convertible according to these provisions, it cannot be attached at all. It is not competent to institute another action to make a proper case for issuing an attachment, or to place property in a situation to be subject to this process. The plaintiff can only bring such actions as the sheriff is authorized to bring by § 238.

The theory of the plaintiff is that the execution of the attachment created a lien upon the bond and mortgage in question, and the equitable action was necessary and proper to set aside the alleged fraudulent assignment.

This action not being authorized by the provisions of the Code referred to, but being an independent action, is in direct conflict with the rule that a creditor has no standing in court to reach equitable assets, until his remedy at law is exhausted, nor to attack a fraudulent transfer of the property of his debtor until after judgment.

One of the grounds for an attachment is a fraudulent transfer of property, and if the plaintiff's position is correct, a creditor at large could always institute an action in the nature of a creditor's bill by first procuring and levying an attachment upon such property.

The attachment laws were intended for no such purpose. Property, whether real or personal, which can be reached according to those laws, can also be converted and applied in payment of any judgment obtained in the action.

The more serious question relates to the first action in which the attachment was issued. The ground for commencing the action and for issuing the attachment was that the defendant was a non-resident, and had property within this State. The bond and mortgage was claimed to be levied upon by virtue of the attachment, by leaving a copy with the debtor and serving the required notice.

They had before been assigned, as alleged, fandulently, to one Cook, and by him to the defendant's wife. The question is whether the attachment laws authorize the sheriff to bring

an action against the assignee, for the purpose of setting aside the assignment for fraud, and subjecting the bond and mortgage to the operation of the attachment and the payment of the plaintiff's debt. I have arrived at the conclusion, with some hesitation, that the sheriff is not authorized to maintain such an action. The authority conferred by § 232 was designed to enable the sheriff to recover possession of the debt and effects of the debtor, and to institute such actions only as might be commenced in the name of the defendant. If such authority exists, it is contained in sub. 4 of § 237, which provides that, until the judgment be paid, the sheriff may proceed to *collect* the notes, etc.

While the language employed contains an implied authority to adopt legal measures, it in terms limits the power to the *collection* of the debts and demands. It confers no authority to institute actions to reach mere equitable assets, or to bring in other parties for the purpose of attacking transfers of such property as fraudulent. That is the office of a creditor's bill, founded upon a judgment and execution. In the case of personal chattels, the sheriff seizes the property and takes it into his possession, and renders himself liable to an action by the claimant. He acquires by such seizure a specific lien, and this court has held that the creditor may defend the lien obtained by the attachment and levy, and thus litigate the title of the claimant to the property. This decision does not violate the general rule, that none but judgment creditors can attack a fraudulent transfer, but recognizes the exception in favor of those who have specific liens upon the property. (*Van Heusen* v. *Radcliff*, 17 N. Y., 580; *Noble* v. *Holmes*, 5 Hill, 194; *Van Etten* v. *Hurst*, 6 Hill, 311.)

In the case of choses in action and debts, the lien is constructive and cannot operate through an intermediate legal title. That title to the bond and mortgage was in a third person, and the property itself was not and could not be interfered with. At law no debt was owing to the defendant, and there was nothing for the attachment to operate upon. Such a lien can only be created upon legal rights, and not mere

equitable interests. Debts and choses in action are to be regarded as legal assets under the attachment laws, whenever that process acts directly upon the legal title, but whenever they are so situated as to require the exercise of the equitable powers of the court to place them in that situation, they must be treated as they always were, as equitable assets only. Any other rule would transform these laws into a substitute for creditors' bills, and produce great confusion and inequalities among creditors, a result not warranted by the provisions, and which, I am persuaded, was never designed. (19 Ala., 139.) To reach the title of a bond and mortgage, an affirmative action in equity was necessary to set aside the assignment which prevented the lien of the attachment from taking effect. Neither the sheriff nor the plaintiff is authorized to bring such an action under the attachment laws. Such a right of action cannot be attached. Until a judicial determination removing the obstruction, no lien could be created. I think the case falls within the principle decided in *Lawrence* v. *The Bank of the Republic.* There the property had been converted into money, requiring an equitable action to reach. Here a legal title has been interposed, requiring a like authority to remove. The transfer was void as to creditors, if made fraudulently, but only as to such creditors as are in a position to assail it. It follows that the order must be affirmed.

All concur, as to first point discussed.

As to second point, ALLEN, RAPALLO and ANDREWS, JJ., concur. GROVER, PECKHAM and FOLGER, JJ., dissent.

Order affirmed.

Statement of case.

IN THE MATTER OF THE PROBATE OF THE LAST WILL AND TESTAMENT OF FREDERICK DIEZ.

Upon an application made to the Supreme Court under the provisions of the act of 1840 (chap. 384, Laws of 1840), to prove an exemplified copy of a foreign will, an order was made adjudging that the instrument so offered was not the last will and testament of the deceased, and denying the application, which order was made upon the ground that the case was not brought within that statute. In proceedings before a surrogate for the probate of the will itself,—*Held*, that such order was no bar.

A seal is not requisite to a will of real or personal estate.

An instrument which is not to have any operation until after the death of him who executes it, is a will, notwithstanding that it may have been executed in pursuance of a previous promise or obligation appearing on the face of the instrument.

A mutual will executed by husband and wife, devising reciprocally to each other, is valid. Such an instrument operates as the separate will of whichsoever dies first.

(Argued April 11, 1872; decided November 12, 1872.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, affirming a decree of the surrogate of the county of New York, admitting to probate the will of Frederick Diez.

The testator was a naturalized citizen of this State, domiciled in the city of New York. In May, 1868, he went to Germany and died at Sonthofen, Bavaria, November 1, 1868. Previous to his death the following instrument was executed:

"MATRIMONIAL AND ALSO TESTAMENTARY AGREEMENT.

"G. K. N., 898.—This day, Sunday, November 1st, 1868 (one thousand eight hundred and sixty-eight), at eleven A. M., appeared before me Francis Xaver Malor, royal notary at Sonthofen, in the house No. 80 at Sonthofen, whither I went at once, according to the request of the parties.

"1. The hotel proprietor, Mr. Frederick Diez, from New York, in the United States of America, at present being in Sonthofen, who, although lying in bed in an upper room in the above named house, suffering from a complaint in the

stomach, and very weak, is in full possession of his mental faculties, and therefore must be deemed fully competent to make dispositions, whereof I have convinced myself by conversation with him.

"2. His wife, Mrs. Ursula Diez, born Trunk, of the same place; lastly:

"3. The two impartial witnesses, whose presence had been especially requested, and who, after examination, have been found free of all exceptions:

"(*a.*) The practicing physician, Dr. Leonard Stich, of Son thofen, and

"(*b.*) The merchant, Mr. Max Mathes, of Sonthofen; both of the latter I am personally acquainted with as to name, occupation and residence, while the name, occupation and residence of the former two persons were only made known to me by the two witnesses present, and Mr. Frederick Diez and his wife, Mrs. Ursula Diez, requested me to reduce to writing and certify in my official capacity the following:

"MATRIMONIAL AND ALSO TESTAMENTARY AGREEMENT.

"'I. We have made, as yet, no conjoint disposition of any kind concerning the hereditary succession in case of death.

"'II. Inasmuch as we have, by joint exertions, acquired the property now in our possession, and inasmuch as the offspring of our marriage, our only child, Mary Diez, has already in the tenderest age departed this life, we hereby determine that upon the decease of one or the other of us, the surviving husband or wife shall receive the entire property of the one having died first, that is to say, the existing jointly acquired property, to his or her, unconditionally, free, sole possession and sole ownership, and shall not be bound to pay over anything to any person in case of a death.

"'III. Also all former dispositions concerning the hereditary succession which may have been made by us singly, or with the consent of both, however and wherever made, between the living, or for the case of death, are hereby set aside and declared null and void.

Statement of case.

"'IV. We desire that a first exemplified copy of the foregoing matrimonial and also testamentary agreement be delivered to us, and we will bear—

"'V. The expenses incurred jointly.

"'Hereupon the present instrument was drawn up by special request of the parties, and after it had been read to them in the presence of the two above-named witnesses, and after their attention had been called to all such legal relations as might possibly stand in the way of such a contract, and after being approved by them, it was ratified to the full contents of it, and signed by them, by the two witnesses, and by myself, the undersigned royal notary.

"Mark of Mr. Frederick Diez, who is unable to write on account of great weakness, wherefore the two witnesses have subscribed for him. ⋈

"URSULA DIEZ.

"L. STICH,
Physician.

"MAX MATHES.

"FRANZ XAVER MALOR,
Royal Notary."

[L. S.].

In 1869 proceedings were instituted in the Supreme Court under the provisions of chap. 384, Laws of 1840, to prove an exemplified copy of this will (the original being then in the possession of the notary of Sonthofen, who drew it). An order was made therein, adjudging "that the instrument so offered for probate is not the last will and testament of Frederick Diez, sufficient at law to pass either real or personal property," and denying the application. The decision was made upon the ground that possession by a notary was not possession by a court or tribunal of justice, and that the case was not brought within the provision of the statute. The original was subsequently procured and presented for probate to

the surrogate of New York by Ursula Diez, widow of the deceased. Probate was contested by Christian Supp, a residuary legatee under a former will. A commission was issued by the surrogate with the will annexed and returned with the depositions of the two witnesses, and also of the notary who drew the will, and upon these depositions, with other testimony, the instrument was admitted to probate. The General Term of the first department sent the case to the second department.

H. P. Townsend, for contestant and appellant. A joint or mutual will is unknown to the testamentary laws of England. (*Clayton* v. *Livermore*, 2 D. & B., 558; Jarman on Wills, 26; *Hobson* v. *Blackburn*, 1 Addams' Eccl. R., 274; and is also unknown to the testamentary laws of this State; Williams on Exrs., 9, 10; 1 Cowp., 268.)

F. S. Stallknecht and *Elial F. Hall*, for proponent and respondent. The paper propounded for probate is a good and valid will. (1 Jarman on Wills, 13; *Green* v. *Proude*, 1 Mod., 117; K. B., 16, 74; *Ex parte Day*, 1 Brad., 484; *Passmore* v. *Passmore*, 1 Phill., 218; *Masterman* v. *Maberly*, 2 Hagg., 235; *Dufour* v. *Pereira*, 1 Dickens, 419; *Walpole* v. *Orford*, 3 Vesey, Jr., 416; 2 Har. Jur. Ar., 304; *Hinckley*, v. *Simmons*, 4 Vesey, Jr., 160; *Hobson* v. *Blackburn*, 1 Addams, 274; *In re Stracy*, 1 Deane & S., 6; *In re Raine*, 1 S. & T., 144; *In re Lovegrove*, 2 id., 453; *Rogers, app'ts*, 2 Fairf., 303; *Clayton* v. *Livermore*, 2 D. & B., 558; *Bynum* v. *Bynum*, 11 Ired., 632; *Ex parte McCormick*, 2 Brad., 169; *Lewis* v. *Scofield*, 26 Conn., 452; *Evans* v. *Smith*, 28 Ga., 98; *Walker* v. *Walker*, 14 Critch., 157; 1 Jar. on Wills, 13; 1 Redf. on Wills, 182; Dayton on Sur., 45; Puchta's Pandekten, 652, § 481.) A will is not required to be under seal. (1 Jar. on Wills, 70; note Willard on Real Estate, 636.)

RAPALLO, J. The order made at Special Term, November 19, 1869, and afterwards affirmed at General Term, adjudg-

ing that the instrument then offered for probate was not the will of Federick Diez, was not a bar to the present proceeding, or conclusive upon the claim now made.

The instrument now propounded is not the same which was then rejected. That was an exemplified copy merely, and was rejected on the ground that the case was not brought within the statute, which allows exemplified copies of foreign wills to be admitted to probate. The present application is not made under that statute, but the document propounded for probate is the original will.

The execution of the instrument in the manner required by the laws of this State for the execution of wills of real and personal property seems to have been satisfactorily proved by the evidence taken on commission; assuming the instrument to be in form a will, no point has been made that any necessary formality was wanting in its execution as such.

The two objections relied upon in the appellant's points are, first, that not being under seal, the instrument cannot be regarded as a will of real estate, and second, that it is in form a contract and not a will.

The first objection is wholly unfounded; a seal is not requisite to a will of real or personal estate. The statute requires only that it be subscribed by the testator at the end. (2 R. S., 63; § 40; 1 Jarman on Wills, 70, note.)

The second objection presents a more debatable question. The instrument is entitled, and refers to itself, in one place, as a matrimonial and testamentary agreement, and in another as a contract, and contains no expression declaratory of its testamentary character, except the words testamentary agreement, or, as translated in the first deposition, "contract of marriage and inheritance" and in the third, "marriage and inheritance contract." These designations are not, however, conclusive as to the character of the instrument. That must be determined by the dispositions which it makes. (1 Jarman on Wills, p. 13; *Ex parte* Day, 1 Bradf., 482, and authorities there cited.)

These dispositions are, in substance, that Diez and his wife each declare that they thereby determine that, upon the decease of one or the other of them, the surviving husband or wife shall receive, unconditionally, the entire property of the one having died first, and that all former dispositions concerning the hereditary succession, which may have been made by either of the parties singly, or with the consent of both, are annulled.

These provisions are preceded by a declaration of the motives leading to such a disposition of the property, which were, that it had been acquired by the joint exertions of the parties and that their only offspring had in the tenderest age departed this life.

It is claimed that the fact that the property, upon which the instrument was to operate, was the product of the joint labor of the parties, furnished a consideration for an agreement between them, that on the death of either it should belong to the survivor, and that the instrument in question was such an agreement and not a will.

The distinguishing feature of a will is, that it is not to take effect except upon the death of the testator. An instrument which is to operate in the lifetime of the donor, and to pass an interest in the property before his death, even though its absolute enjoyment by the donee be postponed till after the death of the donor, or even though it be contingent upon the survivorship of the donee, is a deed or contract, and not a will. But if the instrument is not to have any operation until after death, then it is a will, notwithstanding that it may have been executed in pursuance of a previous promise or obligation appearing upon its face.

Testing the document now before us by this rule, we think that it was the will of that one of the signers who should first die. That it did not purport to convey any present estate or interest in the property, or to deprive either of the parties of the absolute power of disposition of his or her own property during his or her life, but was an arrangement testamentary in its character, and not intended to operate except upon the

death of one of the parties, and then only as expressive of the intention of the one dying as to the posthumous destination of his or her property. It does not use words of grant or mutual contract, but states that the parties have determined that, upon the death of either, the survivor shall receive the entire property. The reasons given for this determination do not necessarily make it a contract.

The fact that by the same instrument the husband and wife devised reciprocally to each other, or, in other words, that it was a mutual will, does not deprive it of validity. There is no just objection to such a form of testating. The instrument operates as the separate will of whoever dies first. Here, the husband having died first, it can be proved as his will, and the efficacy of his dispositions is in no way impaired by those portions of the instrument which if the wife had died first would have constituted her will, but which have now become inoperative. The result is precisely the same as if like reciprocal dispositions had been made by the husband and wife by means of two separate instruments. The combining of such reciprocal dispositions in one instrument is sanctioned by several authorities. (*Ex parte Day*, 1 Bradford, 476; *Lewis* v. *Scofield*, 26 Conn., 452; *Evans* v. *Smith*, 28 Geo., 98; 1 Redfield on Wills, 182; *Rogers, appellants*, 2 Fairfd. [11 Me.], 303; *In re Stracey*, 1 Deane, Eccl. R., 6; *In re Lovegrove*, 2 Swabey & Tristram, 453; *Dufour* v. *Pereira*, 1 Dickens, 419; 2 Hargrave, 310, 311.)

The order should be affirmed with costs.

All concur.

Order affirmed.

Statement of case.

FIRST NATIONAL BANK OF WHITEHALL, Respondent, *v.* JAMES LAMB, et al., Appellants.

No privilege of immunity from the usury laws of the States is conferred upon national banks by the act of Congress of 1864 (13 Stat. at Large, 99), and a contract for a loan, made in this State, with one of these organizations, by which it reserves a greater rate of interest than seven per cent, is void.

The provision of section 30 of said act, limiting the forfeiture to the interest has reference only to the preceding sentence, which prescribes a rate of interest in those States and Territories where no rate is fixed by law. A construction of this provision which would make it applicable to contracts made in States where the rate of interest is regulated, and which would bring it in conflict with State laws, would render it unconstitutional.

The power to create a corporation as an appropriate instrument for the execution of a constitutional power vested in the federal government, only carries with it authority to confer upon that corporation such privileges or immunities from State laws as are necessary to enable it to effect the legitimate national object for which it is created. No such national object requires that national banks should exceed the rates of interest fixed by the States, and no immunity from State usury laws is, therefore, necessary.

(Argued April 3, 1872; decided November 12, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict.

The plaintiff in this action is a national bank organized under the act of congress of June 3, 1864. The action was upon a promissory note against the makers and indorsers. The defense set up was usury, in corruptly taking more than seven per cent per annum for the loan of the money for which the note was given. The judge at circuit held that the State laws against usury did not apply to national banks, and this was affirmed at General Term. (Reported below, 57 Barb., 429.)

L. H. Northrup for the appellants. The contracts of national banks are governed and construed by State laws. (5 Wal., 462; *National Bank* v. *Commonwealth*, 9 Wal., 353, 363.)

W. A. Beach for the respondent. National banks are exempt from all State interference tending to diminish or interrupt their efficiency as agents of the federal government. (*McCulloch* v. *The State of Maryland*, 4 Wheat., 316; *S. C.*, 4 Con. U. S. Rep., 466, 486; *Osborn* v. *Bank U. S.*, 9 Wheat., 733; *Van Allen* v. *The Assessors*, 3 Wal., 573; *The People* v. *The Commissioners*, 4 id., 244; *National Bank* v. *The Commonwealth*, 9 id., 353; *Thompson* v. *Pacific R. R.*, id., 579.) The limit of the forfeiture for usury being declared, the rule that a contract prohibited by statute does not apply. (*Benton* v. *Port Jackson*, 17 Barb., 397; *Griffith* v. *Wells*, 3 Denio, 226.) When a statute confers a right, and prescribes adequate means of protecting it, the proprietor of the right is confined to the statutory remedy. (*Dudley* v. *Mayhew*, 3 N. Y., 9; *Smith* v. *Lockwood*, 13 Barb., 209.) The act of congress and of the State being in conflict, the former must prevail. (*Livingston* v. *Harris*, 11 Wend., 329; *Harrington* v. *Trustees*, 10 id., 547.)

RAPALLO, J. The contract on which this action is brought was made in the State of New York, and its validity depends upon the State laws, unless they are in conflict with some act of congress, passed in pursuance of the Constitution of the United States. Two questions have, therefore, been presented upon the argument:

1st. Are the provisions of the statutes of the State of New York, which declare void all contracts reserving a greater rate of interest than seven per cent per annum, and preclude the recovery thereon of either principal or interest, in conflict with section 30 of the national banking law of June 30, 1864; and,

2d. If, so far as domestic contracts with national banks are concerned, that section does purport to override the State statutes, which declare usurious contracts void, is it constitutional?

No question has been raised in the case touching the constitutionality of any other portion of the act.

Opinion of the Court, per RAPALLO, J.

The first national banking law was passed February 25, 1863 (12 Statutes at Large, 665), and the plaintiff was organized under that act. The act was, however, repealed in 1864, and the act of June 3, 1864 (13 Statutes at Large, 99), substituted in its place, and made applicable to associations organized under the former act.

The leading object of the establishment of these banks was, as expressed in the title of the act of 1864, "to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof."

The act authorizes the formation of associations for carrying on the business of banking, by any number of persons, not less than five, who shall enter into articles of association and file a certificate in the office of the comptroller of the currency, in the form prescribed by the act. They thereupon become a corporation, and on complying with certain conditions, and on the receipt of the proper authority from the comptroller of the currency, may commence the business of banking.

These associations are by the act vested with the powers usually contained in bank charters, and among others, those of having a corporate name, and by such name making contracts, suing and defending in any court of law and equity as fully as natural persons. Their capital stock is raised by individual subscription, and their business is transacted by means of the ordinary machinery of a corporation, for the benefit of the shareholders. They are required to deposit with the treasurer of the United States a certain amount of United States bonds, upon which they receive from the comptroller of the currency circulating notes to an amount not exceeding ninety per cent of the par value of the bonds deposited. These notes they are at liberty to use in carrying on the banking business for their own benefit.

Their principal office seems to be to act as vehicles for the issue and circulation of a currency based upon the credit of the government. But the government has no concern with

their business operations. The currency they issue is protected wholly independently of the result of these. They are made capable of exercising the same rights as natural persons, in making contracts, within their corporate powers, and in appearing in courts of justice. They are made subject to the supervision of the Comptroller of the currency of the United States, in respect to their internal management and affairs, but in their authorized private dealings with third parties they stand on the same footing with natural persons, and are subject to the laws of the States in which they transact their business. Their capital stock and real estate are subject to State taxation (section 41), they are subject to the jurisdiction of the State courts (section 57) and even to the visitorial powers of courts of chancery (section 54). They may be selected as depositaries of the public money, or financial agents of the government (section 45), but in so far as their private business and contracts are concerned, the act does not assume to place them upon any different footing from natural persons selected by the government for the performance of some special public function, and at the same time permitted to carry on a private business on their own account. In so far as the right to carry on their private business is essential to enable them to perform any public function authorized by the constitution, such right is doubtless protected from State interference or State prohibition. But no public character, or privilege of immunity from State laws, in respect of their private dealings, appears to have been conferred upon them. Nor does any interference with State laws seem to be embraced in the general design, save that of conferring upon these associations a corporate existence within the States, together with the power to carry on the business of banking and issuing currency therein, notwithstanding State prohibitions against that business, or conditions imposed upon its exercise. Congress has assumed to confer upon them the power of conducting that business subject to the supervision of Federal instead of State officers; but not to place the private contracts which they may make within

the States on any different footing from those made within the same States by banks chartered by them, or by other persons capable of contracting.

This view is sustained by the opinion of the Supreme Court of the United States in the case of *The National Bank* v. *Commonwealth* (9 Wall., 362), where it is said of these banks: "They are subject to the laws of the States, and are governed in their daily course of business far more by the laws of the State than of the Union. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debt, are all governed by State law. It is only when a State law incapacitates them from discharging their duties to the government that it becomes unconstitutional."

Such, then, being the general scheme of the act, none of its subordinate provisions should be construed to exempt contracts made by these corporations from the operation of a particular State law, unless the intention to do so is so clearly apparent as to leave no room for doubt. If, by any reasonable construction, the provision now in question can be harmonized with the law of the State, that construction should be adopted.

The section (sec. 30, of act of June 3, 1864, 13 Statutes at Large, 9) is in these words:

"Section 30. And be it further enacted, that every association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue, organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this act. And when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days

for which the note, bill or other evidence of debt has to run. And the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon, and in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid from the association taking or receiving the same. Provided, that such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount or sale at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

The construction of this section, so far as relates to the point now under consideration, depends wholly upon the meaning to be attached to the words, "*a rate of interest greater than aforesaid*," in the third sentence of the section. If those words relate as well to the rates allowed by the laws of the States or Territories where the banks may be located, as to the rate prescribed by the act in States and Territories wherein no rate is fixed by law, then it is sufficiently clear that the consequence of taking a greater rate in either case is limited by the act to a forfeiture of the interest. But if we should come to the conclusion that those words were used with reference only to the rate prescribed in the sentence immediately preceding them, it is equally clear that the succeeding provisions have no relation to contracts made in States where the rate of interest is regulated by law.

The grammatical construction of the section is such as to admit of either construction and to leave the meaning to be ascertained from the general scheme of the act and frame of the entire section; and from these we think the intention may fairly be gathered, of leaving all contracts, made in States and Territories where usury laws exist, to be dealt with according to those laws, and at the

same time to impose restrictions upon the corporations about to be created in respect to the rate of interest which they may charge in those States and Territories whose internal policy is such as to leave the subject of interest on money free from legislative regulation.

In respect to dealings of the national banks in those States, it was evidently deemed by congress impolitic to intrust the national banks with the unrestricted liberty in regard to interest which they would have enjoyed under the State laws. Congress, therefore, prescribed a specific rate to which the banks should be limited in those States; and there being no State laws upon the subject, it was necessary to accompany this limitation of corporate power with the qualifications and explanations which usually prevail, or in the opinion of congress ought to prevail, in States where usury laws exist, and also to enforce the limitation by suitable penalties. But neither the rates of interest, nor the rules for determining what constitutes usury, in the States where usury laws exist, seem to have been intended by congress to be affected by this section. For instance, the question whether on the discount of a note, the taking of interest in advance shall constitute usury, is settled by the act with reference to banks located in States having no usury laws, but in others the banks are left subject to the operation of the State laws or decisions. The same sentence in which the banks are restricted to seven per cent in States where no rate is fixed by law, declares that such interest may be taken in advance. It is obvious, from the mere reading of the sentence in which they occur, that the words "such interest" refer only to the interest chargeable in States having no usury laws, and that the permission to take it in advance was not intended to apply, and would not avail, in a State whose decisions or laws did not permit it. The very next sentence is the one upon which this controversy arises. It declares the consequences of taking a rate "*greater than aforesaid.*" These words do not necessarily include the rates fixed by State laws, but are fully satisfied by being construed as referring to the rate of seven per

cent, taken in advance, which is authorized by the sentence immediately preceding.

When congress was framing a usury law for the restraint of the banks in States having no such laws, it was appropriate that it should contain all these provisions; but to construe the act as undertaking to remodel the usury laws of the States would, besides other grave objections, be inconsistent with the manifest purpose of the act to subject the banks to the local policy, on the subject of the interest of money, of those States where interest was regulated by law.

The most rational construction of the section seems to us to be that all the provisions of the section which follow the one fixing a rate of interest, where none is fixed by law, including the clause which provides for a forfeiture of the interest only, in case of exceeding the rate authorized, are applicable only in States and Territories where there are no usury laws, and the rates which the banks may charge are fixed by the act of congress. Those provisions explain and enforce a restriction imposed by congress upon corporations of its own creation, and do not conflict with any State law.

The act of 1863 contained a provision (section 46) restricting the banks to the rates of interest established by the State laws for delay in payment in the absence of any contract, and for exceeding such rates the act declared the debt forfeited. This was a restriction upon the powers of the banks, which might deprive them of a right of action which the State laws would recognize, and was very different from a provision which should allow them to recover upon a contract which the law of the State declared void. It throws no light on the present investigation.

Assuming, however, that the true construction of section 30 of the act of 1864 is, that in all the States the national banks may recover upon usurious contracts, to the extent of the principal, notwithstanding State laws to the contrary, then the further question arises of the constitutionality of such a provision. That question also has a bearing upon the question of construction, for if such an interpretation would ren-

der it unconstitutional, that is another strong ground for rejecting it, if possible.

The power of legislating upon the subject of the validity of private contracts made within the States has not been granted by the Constitution to the general government, but has ever rested with the States. Each one of them, according to its own notions of policy, and without regard to the views of the others, has the right to prohibit and declare invalid, within its own borders, those contracts which it deems opposed to public morals or the welfare of its citizens. Each State had this right before the formation of the general government and it has never been surrendered. When the people of all the States united in framing that government they carefully defined its powers, reserving to each State, not merely its separate organization, but its sovereignty over its domestic affairs, granting to the general government only the express powers enumerated in its written charter, together with authority to pass all laws necessary and proper for the execution of those enumerated powers, and in this form was the Constitution ratified by the States.

If, for the execution of any express power vested in the federal government, it should become necessary to sanction or prohibit a particular class of contracts, in opposition to the laws of the State where made, such a measure would not derive its validity from any power of congress to legislate upon the subject of domestic contracts, but solely from the relation of the measure to the express power in execution of which it was employed, and the existence of such relation is a judicial question. In such a case the legislation of the State could be made to yield to that of the general government, only to the extent to which the former constituted an obstruction to the accomplishment of the legitimate constitutional end which congress had in view.

Chief Justice Chase, in the *License Tax Cases* (5 Wall., 470, 471), speaking of the internal commerce of the States, says: "Over this commerce and trade congress has no power of

regulation nor any direct control. No interference by congress with the business of citizens transacted within a State is warranted by the constitution, except such as is strictly incidental to the exercise of powers clearly granted to the national legislature." And in the case of *The National Bank* v. *Commonwealth* (9 Wall., 362), it is said that "the agencies of the federal government are only exempted from State legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers into an unauthorized and unjustifiable invasion of the rights of the States."

Now, to apply these familiar principles to the case in hand. These banks are created on the theory that they are agents of the government for the accomplishment of certain purposes authorized by the constitution. That to enable them to perform their functions, it is necessary that they should have the power of transacting within the States a general banking business on their own account. It is only upon the theory that this power of transacting banking business is essential to enable them to perform their functions for the government, that the granting of such a power by congress can be sustained.

The power to create a corporation as an appropriate instrument for the execution of a constitutional power, does not carry with it authority to confer upon that corporation unlimited privileges or immunities from State law, but only such as are necessary to enable it to effect the legitimate national objects for which it is created. Speaking of this power of private dealing, which was contained in the charter of the National Bank of 1816, Chief Justice MARSHALL says: "Why is it that congress can incorporate or create a bank? It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object unless it be

endowed with that faculty of lending and dealing in money which is conferred by its charter? If it can, if it be as competent to the purposes of government without as with this faculty, there will be much difficulty in sustaining that essential part of the charter." (*Osborn* v. *Bank of United States*, 9 Wheat., 861.)

Now, if it had been necessary or proper, for the purpose of enabling these banks to effect their national objects, that they should have power to charge interest in excess of the rates allowed by the States where they should be located, and congress had accordingly conferred it, and it were held to be a valid power, then all State laws which impose penalties for exceeding those rates, or obstructed the enforcement of contracts by which they were exceeded, must give way, but solely for the reason that they would obstruct the exercise, by an agent of the government, of a power necessary to the accomplishment of a legitimate national object. But in this case congress has not undertaken to confer any such power. On the contrary, it has expressly limited the banks to the rates fixed by the States.

This is conclusive, that no national object requires that the banks should exceed them. The laws of the States, which avoid contracts in which those rates are exceeded, do not therefore obstruct or impede these agents of the government in doing anything which the public interests require that they should do, or which they are authorized to do. They affect simply their private interests and preclude them from enforcing contracts made, not in behalf of the government, but in their own private business, and which they are, by the law of their creation, not only unauthorized to make, but are expressly prohibited from making. The foundation for any congressional interference with the laws of the States, for the purpose of protecting these institutions against the consequences of making such contracts, entirely fails.

It may be that the provisions of the act of congress are more reasonable and politic than those of the State. In the opinion of many, the State laws are unduly severe, and in the

opinion of many others all laws restricting parties from agreeing upon the rate of interest are inexpedient. But these considerations would not authorize congress to intervene, either directly or indirectly, by modifying State laws in favor of the agents of the government in their private transactions, when the State laws do not interfere with any functions which these agents were to perform for the government. It is not competent for congress to say, in the same breath, "the duties which our agent is to perform for the government require only that he should be permitted to transact his own business for his own benefit, in accordance with the same laws which govern citizens or corporations of the State, but as some of the State laws are in our judgment too harsh in prescribing the consequences of their violation, we will modify them in our agent's behalf in that respect."

There would be no more logic in this than in an act which should modify the criminal law of a State in favor of a government officer who should commit a crime while acting outside of his official duty.

It is a delicate and responsible task to endeavor to draw the line between the powers of the general and State governments, especially when the implied powers of the former are invoked. But when a case involving such an inquiry is in a regular and legal manner presented to a court for adjudication, it has no alternative but to decide it. In doing so, great care should be taken not to adopt too contracted a view of the incidental powers necessary for the proper exercise of the functions of the national government, upon which we rely for protection in our external relations and the intercourse between the States. But equal care should be exercised not to sustain an undue extension of those powers by resorting to over-strained and fanciful relations, for the purpose of connecting matters which in fact appertain to the internal commerce or affairs of the States with national objects, and thus undermining that independence of the States in respect to their domestic concerns which is reserved

to them by the Constitution, and was one of the essential conditions of the union.

The durability of the existing national organization must depend upon the good faith with which control is accorded to each department within its own sphere, and encroachments by either upon the other are avoided. Efforts to hamper or obstruct the national government in the exercise of its legitimate functions, or to extend its authority beyond its proper limits, are alike violations of the Constitution, and perilous to the true interests of the nation. To license individuals or self-constituted corporations, wielding large capitals and scattered throughout the land, to transact business in the States, free from the operation of the laws governing their domestic commerce, especially in the absence of any authorized national object to which the granting of such an exemption is a necessary auxiliary, would, in our judgment, be so manifest an excess of the power confided to the national legislature, as to require that the enactment be pronounced unconstitutional.

According to what seems to us the proper construction, no such excess of power has been attempted in the section under consideration. But, whichever construction be finally adopted, our conclusion is that the defense of usury under the laws of the State of New York was available to the defendants in this action, and that, therefore, the judgment appealed from should be reversed.

A new trial should also be ordered, with costs to abide the event.

All concur.

Judgment reversed.

Statement of case.

HERMAN VON KELLER, Appellant, *v.* HERMAN SCHULTING et al., Respondents.

S. sold to H. & A. S. & Co. a stock of goods. It was agreed verbally that S. should have a one-third interest in the proceeds of sale in excess of $275,000. This interest he offered to sell for $20,000 to K., who agreed to purchase. No money was paid by K., and no evidence of the interest of S. was received by him. The only memoranda made in writing were contained in two letters, both directed and delivered to H. & A. S. & Co.; one, signed by K., directing that firm to credit S. with $20,000 and charge the same to him, and stating that in consideration thereof S. would authorize them to transfer to his (K.'s) credit all the interest of S. in the proceeds; the other, signed by S., directing them to transfer all his interest to K., in accordance with K.'s letter (which was inclosed), and, in consideration thereof, directing them to credit his account $20,000 to the debit of K. H. & A. S. & Co. were not indebted to K., and had no property or securities of his in their hands. They had agreed to loan him the money and credit it to S.; of this it did not appear S. had any knowledge. One of the firm verbally acknowledged the receipt of the letters, and stated the assent of his firm to the agreement. H. & A. S. & Co. were the bankers of S., which was known to K. They did not credit S. with the $20,000. Two days after the letters were written, S. repudiated the arrangement, and demanded back the papers. Some days subsequently, by contract in writing, H. & A. S. & Co. agreed to pay to S. one-third of the proceeds of sale over $275,000. Nothing was ever done by K. or H. & A. S. & Co. toward paying S. for his interest. The goods were subsequently sold, and the interest of S. ascertained to be over $100,000.

In an action by K. to recover this interest,—*Held*, that the only legal evidence of the agreement between S. & K. was that embodied in the letters; that neither the prior negotiations between them, nor the arrangement between K. and H. & A. S. & Co., could be resorted to, to modify or explain these letters.

Also *held* (RAPALLO, J., dissenting), that the signing and delivery of the letters did not transfer the interest of S., if any existed at the time; that the giving him credit in his account upon the books of the firm for the $20,000 was a condition precedent to such transfer, and no such credit having been given, it was not transferred. But, further, that S. had no interest or valid claim against H. & A. S. & Co. at the time the letters were written, and that he was not estopped from raising the question, inasmuch as K. never advanced anything or incurred any liability upon the faith that there was such an interest.

(Argued June 14, 1872; decided November 12, 1872.)

Statement of case.

APPEAL from order of the General Term of the Supreme Court in the first judicial deparment, reversing a judgment in favor of plaintiff entered upon the report of a referee, and granting a new trial.

On the 4th day of August, 1868, the defendant, Herman Schulting, was the owner of a stock of goods, and on that day sold the same to the firm of H. & A. Stursberg & Co. for the sum of $225,000. At the same time it was verbally agreed between them that Schulting should have one-third of the profits which might be realized from the sale thereof, after deducting therefrom the sum of $275,000.

On the 8th of August, 1868, the defendant, Schulting, in consideration of the sum of $20,000 being placed to his credit in the house of H. & A. Stursberg & Co., agreed to transfer to the plaintiff all his share and interest in the profits to be realized out of the sale of the whole stock which Messrs. Stursberg & Co. had bought of him. Nothing was paid down, and no evidence of the interest of Schulting was received by the plaintiff. The written evidence of the contract consists of two letters, in these words:

"NEW YORK, *August* 8th, 1868.

"Messrs. H. & A. STURSBERG & Co.:

"GENTLEMEN.—Please give Herman Schulting credit for the sum of twenty thousand dollars ($20,000), U. S. C., and charge the same to me.

"In consideration of the above, Mr. Herman Schulting will authorize you to transfer to my credit all his share and interest in the profits which may be realized upon the whole stock which you bought of him under the date of 4th inst.

"Yours, very respectfully,

"HERMAN VON KELLER."

"NEW YORK, *August* 8*th*, 1868.

"Messrs. H. & A. STURSBERG & Co.:

"GENTLEMEN.—In accordance with the enclosed letter of Mr. Herman Von Keller, you will please transfer to his credit

all my share and interest in the profits to be realized out of the sale of the whole stock which you bought of me under the date of the 4th inst.

"In consideration of the above transfer you will please credit to my account the sum of ($20,000) twenty thousand dollars, U. S. C., to the debit of Mr. Von Keller.

"Yours, very respectfully,

"H. SCHULTING."

The said papers were executed about three o'clock in the afternoon of the 8th of August, which was Saturday.

Immediately after they were signed, both were sent by Schulting to the Stursbergs. Herman Stursberg afterward verbally acknowledged the receipt thereof to the plaintiff, and verbally stated the assent of his firm to the agreement, and the papers were deposited in the safe of the Stursbergs.

The Stursbergs did not owe plaintiff any money when the papers were signed, nor did he place any property or securities belonging to him in their possession.

Nor did he offer or tender them said $20,000 in money, or any securities for the same.

Herman Stursberg, before the making of the agreement and the signing of the papers by Von Keller and Schulting, verbally promised that his firm would lend the plaintiff the sum of $20,000 to make such purchase, and would credit, or deposit it to the credit of Schulting in case the purchase was completed and the writing signed, and would hold the plaintiff debtor to them for such credit or deposit. Said firm were Schulting's bankers, and he kept an account with them as such. They, however, did not advance the money to plaintiff or Schulting, and did not credit the latter with the $20,000.

On Monday, August 10th, Schulting demanded of the Messrs. Stursberg & Co. the two letters which constituted the agreement between him and the plaintiff, refusing to abide by such agreement. On the 18th August, Schulting and H. and A. Stursberg & Co. entered into a written agreement, by

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which among other things the latter agreed to account and pay to the former one-third of all the profits realized upon the sale of the goods over the sum of $275,000.

The stock of goods realized $576,981.86.

The plaintiff never tendered the $20,000 in money to Schulting, nor has he ever paid the same. He demanded of the Stursbergs an account of the sale of said goods and their proceeds, and the payment to him of one-third of such proceeds over and above $275,000, which was refused.

The referee's conclusions of law were as follows:

1. That by the letter or writings of the 8th of August, 1868, the defendant, Schulting, made to the plaintiff an absolute assignment of all his interest in the fund in question.

2. That upon the execution and delivery of such letter or writings, the plaintiff became and has since continued to be the owner of one-third of the net proceeds over $275,000 of the goods conveyed by Schulting to the Stursbergs, and since sold by them for $576,981.86.

3. That the plaintiff is entitled to an accounting from the defendants, Stursberg, and the account having been stated and agreed upon, is entitled to payment of the sum of $100,660.62, one-third of the excess of said $576,981.86 over $275,000.

4. That judgment be entered accordingly in favor of the plaintiff, directing the defendants, Hermann, Albert and Robert Stursberg to pay to him the sum of $100,660.62.

And that no costs be recovered by either party to this action out of the fund or against any other party.

Judgment was entered accordingly.

W. W. Macfarland for the appellant. The court can look into the evidence for the purpose of construing the findings. (*Spencer* v. *Ballou*, 18 N. Y., 333.) It was not necessary that the engagement of the Stursbergs, to give the credit to Schulting, should be in writing. (*Chapin* v. *Merrill*, 4 Wend., 657; *Mallory* v. *Gillett*, 21 N. Y., 412.) In the case of ascertained chattels tangible, it is the contract of sale that trans

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fers the title, not the delivery of possession. (2 Kent's Com., 492; Chitty on Cont., 393, 394; *Olyphant* v. *Baker*, 5 Denio, 382; Long on Sales, 42; Brown on Sales, 713; *Dixon* v. *Yates*, 2 Nev. & M., 202; *Simmons* v. *Swift*, 5 B. & Cr., 862; *Farling* v. *Baxter*, 5 id., 362; *Elliot* v. *Pybus*, 4 M. & S., 389; *Bloxam* v. *Sanders*, 4 B. & Cr., 941; *Withers* v. *Ludys*, 4 Camp., 237; *Wilmshurst* v. *Bowker*, 2 M. & Granger, 882; Pothier on Sales, 308, 309; 2 Ross Lea. Ca., 481; Code Napoleon, art. 1583; Code of Louisiana, art. 2431.) If actual possession of the thing sold is retained by the seller, he has a lien or special property in the thing, in the nature of the special property of a pledgee, but nothing more. (*Page* v. *Cowasjee Eduljee*, 1 E. L. P., Privy Council Appls., 144, 145; Chitty on Contr., 394 *et seq.*; *Martindale* v. *Smith*, 1 Ad. & E., 389; Benjamin on Sales, 218, 219, 563, 584, 594, 624, 660.) Notice to the debtor is not necessary for the purpose of transferring title to a debt to an assignee. (2 Ross Leading Cases, 578; *Muir* v. *Schenck & Robinson*, 3 Hill, 228; *Richardson* v. *Ainsworth*, 20 How. Pr., 530.) The latter fixed the money as soon as shown the Stursbergs. (*Yeales* v. *Groves*, 1 Vesey, 281.) Their acceptance was not required to be in writing. (*Pilham* v. *Van Mierop*, 3 Bur., 1669; *Barney* v. *Worthington*, 37 N. Y., 115; *Barley* v. *Johnson*, 9 Cowen, 117.) If a credit to Schulting was requisite, its not being done was caused by his attempted repudiation of the contract, and this excuses from strict compliance. (*Williams* v. *The Bank of the United States*, 2 Peters, 101; Comyn's Dig., Title Condition, L. 6; Ccke Littleton, 206, *a*; Bacon's Abridgment, Title Condition, Q.; Viner's Abridgment, Title Condition, G.; Chitty on Contracts, 811; *Shaw* v. *Hurd*, 3 Bib., 372; *Marshall* v. *Craig*, 1 id., 379; *Borden* v. *Borden*, 5 Mass., 69; *Whitney* v. *Spencer*, 4 Cowen, 39; *Alston* v. *Herring*, 11 Exch., 830; Benjamin on Sales, 422, 423; *Smith* v. *Lewis*, 24 Conn., 624; S. C., 26 id., 110; *Hotham* v. *East India Bank*, 1 Term Reports, 638; Domat, §§ 193, 196, 220; 1 Evans' Pothier, 207, 208; *Mustin* v. *Gladstone*, 6 Q. B., 693.) This court

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can modify judgment and deduct the $20,000. (*Chrysler* v. *Renois*, 43 N. Y., 215; *Warfield* v. *Craig*, 4 Keyes, 464; *Casler* v. *Shipman*, 35 N. Y., 533; *Michigan* v. *Phœnix Bank*, 33 N. Y., 29.)

C. Bainbridge Smith for the respondent, Schulting. The two letters of August 8th did not constitute a sale of the property in question. (Chitty on Contracts, 749 [645]; Parsons' Mer. Law, 43, and note; *Mires* v. *Solebay*, 2 Mod., 242; Long on Sales, 187, 188; *Payne* v. *Shadbolt*, 1 Camp., 427; *Copland* v. *Bosquet*, 4 Wash. [C. C. R.], 588; *Kountz* v. *Hart*, 17 Ind., 329; 2 Pars. on Con., 38, 40; Story on Con., § 16; Pars. on Sales, § 246.) Conditions may be implied where none are expressed. (2 Pars. on Con., 1st ed., 38, 40; *Tipton* v. *Feitner*, 20 N. Y. R., 423; *Grant* v. *Johnson*, 5 id., 247; *Parmelee* v. *The Oswego and S. R. R. Co.*, 6 id., 74; *Selden* v. *Pringle*, 17 Barb., 458; Story on Sales, § 253.) Where a sale of merchandise has taken place and the delivery is conditional, the purchaser acquires no right to the property if the condition is not performed. (*Haggerty* v. *Palmer*, 6 John. C. R., 437; *Keeler* v. *Field*, 1 Paige R., 312; *Russell* v. *Minor*, 22 Wend., 659; *Downer* v. *Thompson*, 2 Hill, 137; *Levon* v. *Smith*, 1 Den., 571; *Jessop* v. *Miller*, 1 Keyes, 321; *Fries* v. *Rider*, 24 N. Y., 367; *Ballard* v. *Burgett*, 40 id., 314.) So long as any act remains to be done by the seller or buyer before the delivery, the property does not pass. (*Downer* v. *Thompson*, 2 Hill, 137; *Joyce* v. *Adams*, 8 N. Y., 291; *McDonald* v. *Hewitt*, 15 J., 349; *Olyphant* v. *Baker*, 5 Den., 379; *Chapman* v. *Potter*, 1 Hilt., 866.) The performance of a condition precedent must be averred and proved. (*Dunham* v. *Pettee*, 8 N. Y., 508; *Lester* v. *Jewett*, 1 Kern., 453; *Tipton* v. *Feitner*, 20 N. Y., 423; *Payne* v *Lansing*, 2 Wend., 525; *Johnson* v. *Wygant*, 11 id., 48; *Kelly* v. *Upton*, 5 Duer, 336; *Oakley* v. *Morton*, 1 Kern., 25; *Garvey* v. *Fowler*, 4 Sand., 665; *Clark* v. *Crandall*, 27 Barb., 73; *Holmes* v. *Holmes*, 5 Seld., 525; *Smith* v. *Brown*, 17 Barb., 431; *Hatch* v. *Peet*, 23 id., 575; *Crandall* v. *Clark*, 7 id., 169; *Baldwin* v. *Munn*,

2 Wend., 399; Code of Proc., § 162; *Hutchings* v. *McNutt*, 1 Ham., 16; *Fries* v. *Rider*, 24 N. Y., 367; *Woodruff* v. *Water P. Co.*, 2 Stock., 487; *Richardson* v. *Ford*, 14 Ill., 332.) The $20,000 not being placed to Schulting's credit, there was a total failure of consideration. (*Sherman* v. *White*, How. Ap. Cases, 69; *Archer* v. *Zeh*, 5 Hill, 200; *Brabine* v. *Hyde*, 30 N. Y., 265; *Martin* v. *Allen*, 3 Keyes, 493.)

D. Pratt for the respondents, H. Stursberg *et al.* It was not competent to prove verbal arrangements changing the terms of the writings. (*Van Nostrander* v. *Reed*, 1 Wend., 424; *Erwin* v. *Sanders*, 1 Cow., 249; *Wolfe* v. *Myers*, 3 Sand., 7; *Worrell* v. *Mumm*, 5 N. Y., 229; *Scoville* v. *Griffith*, 12 id., 509; *Dargin* v. *Ireland*, 14 id., 322.) On sale of goods for cash vendor can reclaim after delivery in case of nonpayment. (*Palmer* v. *Hand*, 3 J. R., 435; *Haggerty* v. *Palmer*, 6 J. Ch. R., 437; *Keeler* v. *Feele*, 1 Paige, 412; *Russell* v. *Menor*, 22 Wend., 659; *Downer* v. *Thompson*, 2 Hill, 137; *Levon* v. *Smith*, 1 Denio, 571; *Jessop* v. *Miller*, 1 Keyes, 221; *Pearson* v. *Hoag*, 47 Barb., 243; *Kelley* v. *Upton*, 5 Denio, 336; *Fleeman* v. *McKean*, 25 Barb., 474; *Whitcomb* v. *Hungerford*, 42 id., 177; *Morris* v. *Rexford*, 18 N. Y., 552.) The performance of a condition precedent must be averred and proved. (*Dunham* v. *Petler*, 8 N. Y., 509; *Lester* v. *Jennett*, 11 id., 453; *Tipton* v. *Futner*, 20 id., 423.) An order must be absolute, of and for a sufficient consideration to transfer a fund in the hands of another. (*Norton* v. *Naylor*, 1 Hill, 82; *Hoyt* v. *Story*, 3 Barb., 262.) An actual entry of the credit on the books of the Stursbergs was necessary. (*Clark* v. *Tucker*, 2 Sand., 157; *Ely* v. *Ormsby*, 12 Barb., 670, appealed in Court of Appeals; *Artcher* v. *Leh*, 5 Hill, 200; *Brobin* v. *Hyde*, 30 Barb., 265; *Walker* v. *Hersey*, 16 Mees. & Wels., 301.)

GROVER, J. The large amount involved in this action, the difference as to the law applicable to the facts found between the learned referee and the General Term of the Supreme

Court, and the fact that the judgment of this court will be the final determination of the rights of the parties, impose upon the court the duty of a careful examination of all the questions properly presented for review here. The exceptions taken to the legal conclusions drawn by the referee from the facts found, present the question whether, assuming the truth of all such facts, the plaintiff was legally entitled to recover anything against the defendants or either of them. The alleged purchase by the plaintiff, of the defendant Schulting, of his right to one-third of the money arising upon the sale of a large stock of goods, shortly before transferred by Schulting to the Stursbergs, over and above $275,000, lies at the foundation of the action. If the plaintiff had legally acquired the right to this money, he was entitled to a judgment. If he did not acquire this right, judgment should have been given by the referee dismissing the complaint as to all the defendants.

Section 32, R. S., 136, provides that every contract for the sale of any goods, chattels or things in action, for the price of fifty dollars or more, shall be void, unless, first, a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby, or, second, unless the buyer shall accept and receive part of such goods or the evidences, or some of them, of such things in action, or, third, unless the buyer shall at the time pay some part of the purchase-money. The contract in question must, to be valid, have been made in conformity with this statute. Schulting's right to the money was a thing in action within its meaning. The price was $20,000. Nothing was paid at the time by the plaintiff Schulting. The plaintiff did not at the time accept or receive from Schulting any of the evidences of the thing in action. This shows that the finding by the referee, that on the 8th of August, Schulting verbally offered to sell the said interest to the plaintiff for $20,000, and that the plaintiff verbally accepted such offer, and what the plaintiff said to Schulting about having the money at once, and the reply of Schulting thereto, must be

regarded as wholly immaterial. These facts did not constitute a valid bargain for the sale of the right to the money, nor was it competent to consider them to aid the construction of the papers at that time executed by them. The papers so executed, are the only competent evidence of the contract. These papers were letters signed the one by the plaintiff, and the other by Schulting, and each addressed to H. & A. Stursberg & Co. The one signed by the plaintiff was as follows: "Gentlemen, please give Herman Schulting credit for the sum of ($20,000) twenty thousand dollars, U. S. C., and charge the same to me. In consideration of the above, Mr. Herman Schulting will authorize you to transfer to my credit all his share and interest in the profits upon the whole stock which you bought under the date of the 4th inst." That signed by the defendant was as follows: "Gentlemen, in accordance with the inclosed letter of Herman Von Keller, you will please to transfer to his credit all my share and interest in the profits to be realized out of the sale of the whole stock which you bought of me under the date of the 4th inst. In consideration of the above transfer, you will please credit my account with the sum of ($20,000) twenty thousand dollars, U. S. C., to the debit of Mr. Von Keller." These letters were dated the 8th of August, 1868, and were at the time of their execution (Saturday afternoon) inclosed in an envelope, addressed to the Messrs. Stursberg and forwarded to that firm. The referee further finds that the Stursbergs were aware that the plaintiff was negotiating with Schulting for the purchase of this interest in the proceeds of said property, and before the papers were signed the same were shown and their contents known to Herman Stursberg, one of the partners of the firm, and he approved thereof. That the defendant, Herman Stursberg, at the same time, and before the making of the agreement and signing of the papers by Von Keller and Schulting, verbally promised that the said firm would lend the plaintiff the sum of $20,000 to make such purchase, or would credit or deposit to the credit of Schulting said $20,000 in case the purchase was completed and the writings signed,

and would hold the plaintiff debtor to them for such credit or deposit. There was no finding that Schulting knew anything about these latter facts or evidence given tending to show that he had any such knowledge. They were not, therefore, extrinsic facts, within the knowledge of the parties, at the time of signing the letters; and even if susceptible of furnishing any aid in their construction, cannot be resorted to for that purpose. The referee further finds that the letters were signed about three o'clock in the afternoon of Saturday, and were immediately after sent by Schulting to the Stursbergs, who received the same and placed them in their safe, and that Herman Stursberg afterward verbally acknowledged the receipt thereof to the plaintiff, and verbally stated the assent of his firm to the agreement. The referee further found that the Stursbergs did not owe the plaintiff anything when the papers were signed, nor did he place any property or securities belonging to him in their hands. That he never paid them anything, or offered so to do, or gave them any security. That the Stursbergs did not advance the money to the plaintiff or to Schulting, and did not credit Schulting with $20,000 on their books, or do anything in respect to the advance or credit after the interview hereinafter stated. That at an early hour on Monday morning, the 10th of August (the morning after the execution of the letters), the plaintiff and Herman Stursberg went to the store where the goods were to look them over and consult about the sale, and that Schulting met them there and immediately demanded the return of his papers executed by him, saying that his wife was not satisfied, and that she said he was insane when he signed them. After this, nothing was done by the plaintiff or the Stursbergs toward paying Schulting for the goods, nor was he ever paid anything, nor did the Stursbergs ever give him any credit therefor.

From these facts the referee found as conclusions of law that by the letters of the 8th of August, 1868, the defendant Schulting made to the plaintiff an absolute assignment of all his interest in the fund in question. That upon

the execution and delivery of such letters, the plaintiff became and has since continued to be the owner of one-third of the net proceeds, over $275,000 of the goods sold by Schulting to the Stursbergs, and since sold by them for $576,981.86, and orders judgment for the plaintiff for $100,660.62, without making any provision whatever for the payment of the $20,000 to Schulting. The legal conclusions of the referee, it will be seen, are based entirely upon the effect of the letters of the 8th of August. This entirely repels the assumption that he found any additional facts in support thereof, which is sometimes made when the case contains proof which would authorize such findings to sustain the judgment. The real question in the case is, whether the signing and delivery of the letters transferred to the plaintiff this fund or whether something else was to be done. I think the letters did not, and were not intended to, accomplish any such result, certainly not by Schulting. The plaintiff's letter directs the Stursbergs to credit Schulting $20,000 and charge the same to him, in consideration of which Schulting would authorize them to transfer the fund to him, etc. This admits of no other construction than that the authority to transfer to be given by Schulting was a condition precedent to giving the credit and making the charge. No one can claim that there would have been any validity to the credit and charge in the absence of such authority. It is not material to inquire whether the authority to transfer being given and the credit and charge made on the books, an assignment of the claim executed by the Stursbergs to the plaintiff was not necessary to transfer the legal title, as it is clear the equitable title would have passed. The construction of the letter of the defendant is, if possible, still more clear. That authorizes a credit of the fund by the Stursbergs to the plaintiff. In consideration of the above transfer they were to credit his account with $20,000 and charge the same to the plaintiff. This can only mean that upon the condition that the Stursbergs credited his account with $20,000 and charged the same to the plaintiff in such a way that the production and proof of the books would furnish complete evi-

dence in his favor of their liability to him. To that extent they might transfer the claim, but not otherwise. Could there be a possible doubt of the meaning as to what was to be done, it is removed by the other evidence in the case. From that it appears that the Stursbergs were the bankers of Schulting and that he kept an account with them as such, and that this was known to the plaintiff. It was this account that was to receive the credit, as the condition precedent to the transfer, and the referee erred in holding otherwise. But it is said that H. Stursberg promised before the letters were executed to lend the money or make the credit. This was a promise entirely without consideration, and therefore void; but had it been valid, it would not have been a performance of the condition. A verbal promise was not what Schulting required. That was a credit actually entered in his banking account that would prove his right to the money whenever he called for it. But it is said the entry was but a mere form. The same with equal force might be said had Schulting required a note to be given. That would be no better evidence of his right than an actual entry to his credit upon the books. Either would be far better than a mere verbal assent, even if such assent was binding when proved. From the evidence in the case, I should infer that Schulting would have had but a poor prospect of proving that H. Stursberg ever even promised before the letters were written to give the credit or assented to it verbally afterward, had the goods upon sale have produced no excess over the $275,000. Schulting himself knew nothing of this. It seems to have been known only to H. Stursberg and the plaintiff. But it is said that Schulting himself prevented the credit being given, and he cannot take advantage of his own wrong. The answer to this is that no such fact is found, and there is no evidence to warrant the assumption of any such finding by this court, even if such assumption was not repelled by the legal conclusion of the referee. Then under the advice of his wife he threatened to institute proceedings to set aside the sale to Stursberg, on the ground of his insanity, a sale by which, as

the uncontroverted evidence shows, they acquired to a stock of goods which were sold at auction for upward of $570,000 for $225,000; and when his wife interfered in this negotiation, to satisfy her, H. Stursberg verbally promised to give him or to her one-third of the proceeds, over $275,000, which it appears Schulting refused to take, and when the contract was thereafter reduced to writing this provision was omitted. This threat and settlement of this controversy by a new agreement, in which the provision was inserted, in no way prevented the plaintiff placing in the hands of the Stursbergs $20,000 to the credit of Schulting. It may have changed the purpose of Stursberg in regard to lending plaintiff the money, but there is not a particle of evidence that Schulting ever knew of any such purpose. The letters would have led him to suppose that the plaintiff had money in Stursberg's hands which was by the credit and debit to be transferred to him. The General Term rightly reversed the judgment for the legal error of the referee as to the effect of the letters. It is equally clear that the referee erred in finding the fact that Schulting had any valid claim against the Stursbergs for the fund at the time the letters were written. Upon the supposition that Schulting was competent to make a valid contract at the time it was reduced to writing, he had no such claim. The verbal promise made during the negotiation was merged in the writing. There was no estoppel for the reason that the plaintiff never advanced anything or incurred any liability upon the faith that there was any such interest.

The order of the General Term must be affirmed and judgment absolute against plaintiff.

All concur except RAPALLO, J., who is for reversal of order and affirmance of judgment on report of referee, deducting $20,000.

Order affirmed and judgment absolute against plaintiff, with costs.

Statement of case.

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119	267
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THE J. RUSSELL MANUFACTURING COMPANY, Appellant, *v.* THE NEW HAVEN STEAMBOAT COMPANY, Respondent.

Where it has been the long-continued practice of a manufacturing company to ship its goods daily by a regular line of steamboats, consigned to its agent for sale, and it has been part of the regular routine of business of the agent, without notice, to call for and receive the goods upon their arrival each day at the carriers' wharf at the place of destination, and to remove them, a specific notice from the carrier of the arrival of each parcel is not necessary. The duty of the carrier, as such, is performed when the goods are landed at the accustomed place and the consignee has had a reasonable time to remove them. But if the goods are received upon a holiday, and it has been the usage for the consignee not to receive goods upon those days, he is entitled to a reasonable time after that day to remove them.

Although in an action against a bailee for loss of or damage to goods by accident the burden of proof of negligence rests upon the plaintiff yet the nature of the accident itself may afford *prima facie* proof of, negligence. If it is one which, in the ordinary course of events, would not have happened but for the want of proper care on the part of the bailee, it is incumbent upon him to show that he took proper precautions; and his failure to furnish this proof, which, if it existed, would have been in his power, may subject him to the inference that such precautions were omitted.

Plaintiff's goods, while upon defendant's wharf, were destroyed by fire occurring in the night time, originating upon the wharf. A large quantity of other freight was upon the wharf and was also destroyed. Evidence was given tending to show that no apparatus or means for extinguishing fires were kept there. A private watchman was left in charge, with some colored men, but neither he nor any of them were produced as witnesses, nor did it appear that he was at his post, or that any person was upon the wharf when the fire broke out. *Held*, that the evidence was such as to require the submission of the question of negligence to the jury, and that a direction of a verdict for defendant was error. (The case of *Lamb* v. *The Camden and Amboy R. R. Co.*, 46 N. Y., 271, distinguished.)

(Argued April 26, 1872; decided November 12, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of defendant entered upon a verdict.

This action was brought against defendant, as a common

carrier, to recover damages for the loss of a quantity of cutlery destroyed by fire, upon defendant's wharf, in the city of New York. The facts sufficiently appear in the opinion. At the close of the evidence the court directed a verdict for defendant.

H. M. Ruggles for the appellant. The liability of a common carrier as insurer continues until the goods are delivered or a reasonable time for examination and removal after notice is afforded and the goods are deposited in a place of safety. (*Fisk* v. *Newton*, 1 Den., 45; *Price* v. *Powell*, 3 N. Y., 322; *Miller* v. *Steam Nav. Co.*, 10 id., 438; *Goold* v. *Chapin*, 20 id., 266, 267; *Ladue* v. *Griffith*, 25 id., 368; *Hathorn* v. *Ely*, 28 id., 87; *McDonald* v. *Western R. R. Co.*, 34 id., 501; *Northrup* v. *The Syracuse, B. & N. Y. R. R. Co.*, 5 Abb. Pr. [N. S.], 428, 432; *Manhattan Oil Co.* v. *Camden & A. R. R. Co.*, 52 Barb., 85; *Barclay* v. *Clyde*, 2 E. D. Smith, 95; *Rowland* v. *Miln*, 2 Hilt., 150; *Atlantic Nav. Co.* v. *Johnson*, 4 Rob., 499; *Hodges* v. *Hudson River R. R. Co.*, 6 id., 126; *Fenner* v. *B. & S. L. R. R. Co.*, 44 N. Y., 510, 511; *Witbeck* v. *Holland*, 45 id., 17; *Mills* v. *The Mich. Cen. R. R. Co.*, 45 id., 625; *Lamb* v. *C. & A. R. Co.*, 46 N. Y., 271; *Redmond* v. *Steamship Co.*, id., 578; *Richardson* v. *Goddard*, 23 How., 39; *The Eddy*, 5 Wal., 495; *The Mary Washington*, 1 Abb. [U. S.], 3, 4.) The giving of notice was not waived. (*Hyde* v. *T. N. Co.*, 5 T. R., 396.) Whether a reasonable time for removal was afforded was a question of fact for the jury. (*Burnell* v. *N. Y. Cen. R. R. Co.*, 45 N. Y., 186, 187; *Mills* v. *Mich. Cen. R. R. Co.*, 45 id., 626; *Lamb* v. *C. & A. R. R. Co.*, *supra*; *Ins. Co.* v. *Stark*, 6 Cranch., 273.) The custom of abstaining from work on the 4th of July appearing, the consignee had until the 5th to examine and remove them. (*Mills* v. *N. Y. C. R. R.*; 45 N. Y., 626; *Richardson* v. *Goddard*, 23 How., 39, 44.) No proof of local custom is admissible to vary a contract or override settled rules of law. (*The Reside*, 2 Sand., 567; *Markham* v. *Jaudon*, 41 N. Y., 245; *Reed* v. *Richardson*,

98 Mass., 218.) What amounts to ordinary care, or whether under conceded circumstances a bailee is negligent, is a question of fact. (*Ireland* v. *Oswego R. R. Co.*, 13 N. Y., 533; *Ernst* v. *H. R. R. Co.*, 35 id., 39, 40, 47.)

S. P. Nash for the respondent. By the non-removal of the goods on the fourth, defendant was freed from responsibility, save as bailee. (*Richardson* v. *Goddard*, 23 How., 28.) Carriers by rail or steamboat, whose routes end at known wharfs or depots, arriving at regular hours, are discharged as carriers as soon as goods are landed and ready for delivery. (Redfield on Railways, 1st ed., 249, 259; vol. 2 of 2d ed., 54, 55; *The Norway Plains Co.* v *The Boston, etc., R. R. Co.*, 1 Gray, 263; *Thomas* v. *The Boston, etc., R. R. Co.*, 10 Metc., 472; *Farm. & Mech. Bank* v. *The Champlain Transp. Co.*, 16 Vt., 52; S. C., 18 Vt., 131; 33 Vt., 186; 20 Ill., 404, 407; 11 Rich. Law [S. C.], 437.) A usage for the consignee to leave the goods until called for terminates the special liability as carrier. (*Gibson* v. *Culver*, 17 Wend. 305.) So also an arrangement between the parties. *Hathern* v. *Ely*, 28 N. Y., 78; *Fenner* v. *Buffalo, etc., R. R. Co.*, 44 id., 505.) There is no rule of law requiring notice. *Witbeck* v. *Holland*, 45 N. Y., 13; *Roth* v. *B. & C. R. R. Co.*, 34 id., 548.) The occurrence of a fire is not *per se* evidence of negligence. (*Lamb* v. *C. & A. R. R. Co.*, 46, N. Y., 271.)

RAPALLO, J. The facts appearing upon the trial were, that the plaintiff was a company engaged in the manufacture of cutlery at Greenfield, Massachusetts, having an agency in the city of New York for the sale of its products. That for some years previous to the occurrence, out of which this action arose, it had been in the habit of sending its products to its agent at New York via New Haven, their transportation from the latter place to New York being performed by the defendant, by means of a line of steamboats operated by it. That this line plied daily and regularly between New York and

New Haven, leaving and arriving at a particular pier at New York and at regular hours. That all the products of the plaintiff's factory were sent in this manner to its New York agency, coming invariably by the same line, except in case of its interruption by accident, and the goods were received by the agent at New York every day, except Sundays and holidays. It does not appear to have been the practice to send notice of the arrival of the goods to the plaintiff's agent, but to land them on the defendant's wharf, where they were called for daily by a carman who went to the wharf each morning and brought to the store of the plaintiff's agent all goods addressed to him. The carman does not appear to have been in the employ of the steamboat company but of the various parties receiving goods by its boats. The goods now in controversy arrived on the morning of the 4th of July, 1866, and were landed and ready for delivery upon the defendant's wharf as early as eight o'clock A. M. of that day. The receiving clerk of the defendant remained at the wharf all that day and until twelve o'clock at night. The plaintiff's goods were not called for, but remained upon the wharf. Some time during the night or early on the morning of the 5th of July, a fire broke out on the wharf by which the goods were destroyed.

The plaintiff claims that the goods were at the time of their destruction in the custody of the defendant as a common carrier, no notice of their arrival having been given, and a reasonable time for their removal not having elapsed, and that therefore the defendant is liable for the loss, without regard to any question of negligence.

We think that the long established course of business between these parties, in the transportation of the products of the plaintiff's factory to New York, takes the case out of the operation of the general rules applicable to the delivery of goods by common carriers. In ordinary cases, notice to the consignee of the arrival of the goods and a reasonable opportunity, after such notice, to take charge of or remove them, are indispensable to relieve the carrier from his responsibility as such. But in this case it appears to have

been a part of the regular routine of the business of the plaintiff's agent to receive from the defendant's wharf the daily shipment from the factory; the carman came daily to the wharf, whence he conveyed the goods to the store of the consignee, and from this long continued practice the consignee must have known that, in the ordinary course of business, goods arriving from the factory by defendant's line would be awaiting him each day at the steamboat wharf. Where a regular business is thus carried on we think that a specific notice from the carrier of the arrival of each parcel is not necessary, and that his duty is performed when he has landed the goods at the accustomed place, and the consignee has had a reasonable time to remove them. The question remaining to be considered is whether he had such reasonable time.

The practice appears to have been to carry away, each day, the goods arriving in the morning by the boats. A full day, therefore, unquestionably afforded ample time for the removal. It is not claimed, on the part of the plaintiff, that the time was insufficient if the consignee was bound to receive and remove the goods on the 4th of July. But evidence was introduced to the effect that it had, for several years, been the custom of the consignee and others engaged in similar business, and in the habit of receiving goods by the defendant's line, not to keep their stores open or receive or remove goods arriving by defendant's line on that day, and, therefore, the plaintiff claimed that that day was not a reasonable time for their removal, and the carrier was bound to hold them subject to its responsibility as carrier during that day.

The 4th of July is not a legal holiday, except for certain specific purposes, not affecting this case. It presented no legal obstacle to the removal of the goods. (*Richardson* v. *Goddard*, 23 How. U. S. R., 28.) But we think that the evidence, as to the usage claimed by the plaintiff to exist in respect to receiving goods on that day, should have been submitted to the jury, and that they should have been charged as requested, that in case there was such a usage or established course of dealing, in that respect, as was claimed by the plain-

tiff, the consignee was entitled to a reasonable time after that day to remove the goods.

At the close of the trial, the plaintiff requested the court to submit to the jury the question whether the loss occurred by reason of negligence on the part of the defendant. The court refused, and an exception was duly taken to this refusal.

This exception raises the question whether there was any evidence in the case which would have sustained a finding by the jury of negligence on the part of the defendant.

The wharf upon which the fire occurred and the goods were placed appears to have been in the occupation of the defendant; a large quantity of goods besides the plaintiff's were upon it at the time of the fire and were destroyed. It was about 300 feet long, and provided with a gate through which passengers, by the defendant's boats, were admitted. The defendant's receiving clerk was there until about twelve o'clock on the night in question. One of the defendant's boats left the wharf with passengers at about that time. A police officer remained there until a little after midnight, when he left the wharf in its usual condition, with freight piled upon it in proper order and a private watchman in charge with some colored men. The fire occurred at some time between midnight and three o'clock A. M., but at what precise time does not appear. It may be inferred from the evidence and admissions on the trial that the fire originated on the wharf. Two witnesses testified that they had frequently been on the dock, but had never seen any apparatus or means for extinguishing fire there. Neither the private watchman nor the colored men were produced as witnesses, nor did it appear that the watchman was at his post, or that any person was upon the wharf when the fire broke out.

We think that enough was shown to call upon the defendant to explain the circumstances attending the destruction of the property; and that, in the absence of any such explanation, the jury would have been authorized to infer that proper precautions for its safety had not been taken. Whether due caution required that the wharf should be furnished with

the means of extinguishing fire, or that a watchman should be kept there during the night, were questions for the jury, dependent upon the circumstances of danger which may have surrounded the premises. The plaintiff's evidence of the absence of the means of extinguishing fire was not of the most satisfactory character; but the defendant, although possessing the best means of proof upon the subject, did not controvert it; while the fact of the fire originating on the defendant's premises, in connection with the failure of the defendant to offer any explanation of its origin, or even to produce any of the persons said to have been left in charge, or to show that they performed their duty, or that any effort was made to take the goods out of the reach of the fire, were circumstances from which the jury might have drawn inferences unfavorable to the defendant on the question of negligence. The nature of an accident may itself afford *prima facie* proof of negligence (*Curtis* v. *Roch. and Syra. R. R. Co.*, 18 N. Y., 534, 544; Story on Bailments, § 338, 5 Exch., 787; 3 Hurlst. & Coltm., 596; 13 Peters, 181; 5 Ad. & El., 747; 11 Pick., 106; 2 Camp., 79), and we think, as the case stood, the judge erred in not submitting the question of negligence to the jury.

These views do not conflict with the case of *Lamb* v. *The Camden and Amboy R. R. Co.* (46 N. Y., 271), cited on the part of the respondent; although the burden of proof of negligence in such cases unquestionably rests upon the plaintiff, yet he is not always required to point out the precise act or omission in which the negligence consists. Negligence may be inferred from the circumstances of the case. Where the accident is one which in the ordinary course of events would not have happened but for the want of proper care on the part of the defendant, it is incumbent upon him to show that he had taken such precautions as prudence would dictate, and his failure to furnish the proof, where, if it existed, it would be within his power, may subject him to the inference that such precautions were omitted. In *Scott* v. *London, etc., Dock Co.* (3 Hurlst. & Coltm., 596), the rule that the burden

of proof of negligence in this class of cases rests upon the plaintiff was fully recognized, but the rule was laid down thus: "If the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from the want of proper care." The burden of proof on the issue of negligence is not changed by this rule. The jury must find affirmatively that the defendant was negligent; and if, after duly considering all the evidence, and all inferences proper to be drawn from it, they are in doubt, the defendant is entitled to the benefit of that doubt. He is not required to satisfy the jury, affirmatively, that he was free from negligence. That was all that was decided in the case of *Lamb* v. *C. and A. R. R. Co.* The question, what was sufficient *prima facie* evidence of negligence, was not passed upon.

The judgment must be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

JAMES O'BRIEN, Sheriff, etc., Respondent, *v.* THE GLENVILLE WOOLEN COMPANY et al., Appellants.

Where actions have been commenced in this State by a foreign corporation upon subscriptions to its capital stock, and where a warrant of attachment has been issued against such corporation, by virtue of which the sheriff has attached the debts sought to be recovered in such actions, the sheriff has the right, under section 237 of the Code, to assume the prosecution thereof, either in his own name or in that of the original plaintiff. They can also be prosecuted by the plaintiff in the attachment proceedings upon giving the bond required by section 238.

Where several attachments have been issued and one of the attaching creditors assumes the prosecution of such actions, this does not conclude the others or operate as a bar to their claims. Until the debts are collected and appropriated to the payment of the attaching creditors in the order of their priority, they are in the custody of the law, and the sheriff is

Statement of case.

responsible to the party legally entitled thereto for whatever shall be collected in the pending actions. He is a proper party, therefore, to bring an action against the adverse claimants of the fund to settle and establish their respective rights, or an action can be brought for that purpose by another of the attaching creditors.

In case, however, it is determined that the attaching creditor who prosecuted the actions is not entitled to the avails of the collections, he or his attorney is entitled to the costs recovered therein.

Whether upon the decease of the sheriff, in whose name an action has been instituted, to determine the rights of attaching creditors, his successor can be substituted as plaintiff, *quere*. The latter, as official successor and as trustee for all concerned, is a proper party.

(Argued April 8, 1872; decided November 12, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment determining the rights of several attaching creditors entered upon the decision of the court at Special Term; also appeal from order of said General Term, affirming an order of Special Term continuing the action in the name of the present plaintiff.

This action was brought originally in the name of John Orser, late sheriff of the city and county of New York, to determine the rights of several attaching creditors as hereinafter specified.

The defendants, the Glenville Woolen Company, are a foreign corporation established under the laws of Connecticut, and were doing business as such in the year 1855.

On the 13th of October, 1855, two actions in the Superior Court of the city of New York were commenced by said company, one against the defendant, Ripley, and the other against the defendant, Cameron, for recovery of calls due on their shares of its capital stock.

On the 10th of August, 1855, John Whittal and William W. Pendleton commenced in the Supreme Court an action arising against the said Glenville Woolen Company, and on the same day an attachment against the property of the company, as a foreign corporation, was issued in said action, and delivered to Orser, as sheriff, to be executed.

Statement of case.

On the 27th October, 1855, Ralph H. Isham and Joseph G. Isham, by Williams and Barnard, their attorneys, commenced an action in the Supreme Court against said company, and on the 29th day of October, 1855, an attachment against the property of said company was issued in such action and delivered to Orser to be executed.

The said Ralph H. and Joseph G. Isham, having given security to the sheriff under section 238 of the Code of Procedure, procured their attorneys to be substituted as attorneys for the Glenville Woolen Company in the two actions above mentioned.

And the said actions have ever since been carried on and prosecuted by the attorneys for said attaching creditors and their assignee.

On the 20th December, 1855, an action was commenced in the Supreme Court by Cousinery & Craig against said company, and on the same day an attachment was issued in said action against the propertyof said company and delivered to be executed to John Orser, then sheriff, as aforesaid. Other attachments also were issued and delivered to the sheriff.

On the 20th November, 1855, judgment was entered against the said company in the action commenced by said R. H. and J. G. Isham for $4,921.69.

On the 25th August, 1863, judgment was entered up against the company in the action commenced by Whittal and Pendleton for $1,018.50.

There is contained in the judgment roll an affidavit of Hugh Crombie, the deputy in charge of the various attachments made.

On 10th December, 1863, judgment was entered up against the Glenville Woolen Company in the action commenced by Cousinery and Craig for $11,339.81.

In or about the year 1861, assignments of the claims of Whittal & Pendleton and R. H. and J. G. Isham were made to R. H. Isham.

On the 1st March, 1862, an execution was issued on the

Isham judgment, by leave of this court, directed to John Orser as ex-sheriff, and was lodged with him.

In August, 1863, an execution was issued on the Whittal & Pendleton judgment, also directed to John Orser as ex-sheriff, and was lodged with him.

On 20th December, 1864, an execution was issued against the Glenville Woolen Company, on the Cousinery & Craig judgment.

In the actions against Ripley & Cameron, judgments were obtained for $3,336, principal and interest, and for $447.81 costs in each case.

These judgments were affirmed on appeal to the General Term and have since the trial of this action been affirmed by the Court of Appeals. (See *Glenville Woolen Company* v. *Ripley*, 43 N. Y., 206.)

On the 22d February, 1869, Cousinery & Craig issued an execution on their judgment, directed to John Orser as ex-sheriff, and lodged the same with him.

They also gave security to the plaintiff as ex-sheriff in the form prescribed by § 238 of the Code of Procedure.

And on the 26th February, 1869, they commenced this action in the name of John Orser, sheriff, against the Glenville Woolen Company, Ripley, Cameron & Isham, asking that the company and all persons acting in its name or behalf be enjoined from collecting the said two judgments, that Ripley & Cameron be enjoined from paying the same to any one except the plaintiff or Cousinery & Craig, and that Ripley & Cameron be adjudged and decreed to pay the same to Cousinery & Craig, or to the plaintiff for their benefit.

The defendants, Ralph H. Isham and the Glenville Woolen Company answered.

The justice before whom the cause was tried found that only the attachment of Cousinery & Craig were properly served upon Ripley & Cameron, and that they therefore were entitled to the avails of the judgment, and directed judgment substantially as asked in the complaint, and in consequence of the death of Orser after the trial and before decision, ordered

the judgment to be entered as of the date of the trial. Judgment was entered accordingly.

An order was subsequently granted upon motion continuing the action in the name of the present plaintiff.

Henry Whittaker and *John H. Reynolds* for the appellants. This action is barred by the statute of limitations, if not technically, at least equitably, by reason of laches. (Story's Eq., § 1552; *Reinus* v. *Druce*, 23 Beav., 1; *Board* v. *Corey*, 15 N. Y., 503; *Howland* v. *Edmonds*, 24 id., 307; *Cleveland* v. *Boerum*, id., 613; *Bruce* v. *Tilson*, 25 id., 194, 199, 203; *Adams* v. *Fort Plain Bank*, 36 id., 255; *Roberts* v. *Sykes*, 30 Barb., 173; *Hirsch* v. *Brooks*, 50 id., 334; *Dunham* v. *Nicholson*, 2 Sandf., 636; *Catlin* v. *Doughty*, 12 How., 457; *Coleman* v. *Second Avenue R. R. Co.*, 38 N. Y., 201.) The Code gives no authority to commence proceedings for the collection of an attached debt after the entry of judgment in attachment suit. (Code, §§ 232, 237, 238; *Thompson* v. *Culver*, 38 Barb., 442.) The court will not create privileges for which the legislature has omitted to provide. (*Kemp* v. *Harding*, 4 How., 178, 180 (per ALLEN J.). The present action is not maintainable in name of plaintiff. (*People* v. *Reeder*, 25 N. Y., 302; *Kuhlman* v. *Orser*, 5 Duer., 243, 248; *Sheldon* v. *Payne*, 10 N. Y., 398.) The sheriff owed a paramount duty to such of the attaching creditors as were senior in priority, and for neglect he is responsible. (2 R. S., 440, § 47; Code § 419.) It was his duty to make all necessary levies, and of any omission he is responsible. (*Ransom* v. *Halcott*, 18 Barb., 56, 59; *Swezey* v. *Lott*, 21 N. Y., 481, 484, and cases cited; *Davey* v. *Fields*, 2 Keyes, 608, 616; *Smith* v. *Orser*, 42 N. Y., 132.) By the levy on the debts of Ripley & Cameron, the sheriff was entitled to collect them, and the right to continue the actions already commenced. (Code, §§ 121, 232; *Howard* v. *Taylor*, 5 Duer., 604; *Russell* v. *Ruckman*, 3 E. D. Smith, 419; *Kelly* v. *Breusing*, 33 Barb., 126.) The decision adjudging that Ripley & Cameron

pay the debts to Cousinery & Craig was error. (*Davey* v. *Field*, 2 Keyes, 608, 616.) Cousinery & Craig were privies to the proceedings in the Superior Court, and bound by its adjudication and disqualified from interfering therewith. (Greenleaf on Ev., §§ 189, 523; *Bates* v. *Stanton*, 1 Duer, 79 [87], etc.; *Duchess of Kingston Case*, 2 Smith's Leading Cases, 552, 553, and notes; *Craig* v. *Ward*, 35 Barb., 377, 383, etc.; *Embury* v. *Conner*, 3 Comst., 511, 522; *Voorhees* v. *Seymour*, 26 Barb., 569 [583]; *Goddard* v. *Benson*, 15 Abb., 191; *Green* v. *Clark*, 2 Kern., 343; *Castle* v. *Noyes*, 4 id., 329, 332; 3 Comst., 71; 5 Denio, 517.) This suit is claimed to be one for the collection of property under section 238. The suits in the Superior Court are for identically the same purpose. The complaint, therefore, should have been dismissed. (*Glenville Woolen Co.* v. *Ripley*, 6 Robertson, 530; S. C., 43 N. Y., 206; S. C., [on motion to change attorneys], 11 Ab. N. S., 87, 90; *Van Kleck* v. *Clark*, 38 Barb., 316; *Schell* v. *Erie R. Co.*, 35 How., 438, 444; *Grant* v. *Quick*, 5 Sandf., 612; *Mariposa Co.* v. *Garrison*, 26 How., 448; *Bennett v. Le Roy*, 6 Duer., 683; *McCarthy* v. *Peake*, 18 How., 138; *Thompson* v. *Van Vechten*, 6 Duer., 618.)

Lucien Birdseye for the respondent. The findings of fact cannot be reviewed upon this appeal. (Code, § 268; *Colwell* v. *Lawrence*, 38 N. Y., 71; S. C., 36 How., 316.) To create a lien under an attachment, there must be an actual service of it, as prescribed by sections 232 and 235 of the Code. (*Learned* v. *Vandenburgh*, 7 How., 379; 8 id., 77; *Ransom* v. *Halcott*, 18 Barb., 56.) The statute of limitations is no defense to this action. (*Stewert* v. *Skinner*, 39 Barb., 206.) He who covenants for the result of a suit between others is privy to the proceedings, and the judgment is conclusive against him. (1 Greenleaf Ev., § 523; *Rapelyea* v. *Prince*, 4 Hill., 119; *Bates* v. *Stanton*, 1 Duer, 79, 88; *Castle* v. *Noyes*, 4 Kern., 329.) The order continuing cause was not appealable. (Code, § 11, sub. 4; *Hughes* v. *Rathbone*, Alb.

Law J., Jan. 28, 1871, p. 71.) Judgment was properly entered *nunc pro tunc.* (*Cumber* v. *Wane*, 1 Strange, 425; Broome, L. M., 52, and in 1 Smith's L. C., 150, *a;* 2 Dunlap Pr., 747; *Rightmeyer* v. *Dunham*, 12 Wend., 245; *Spaulding* v. *Congdon*, 18 Wend., 543; *Gurney* v. *Parks*, 1 How. Sp. T. R., 140; *Crawford* v. *Wilson*, 4 Barb., 504, 524; *Diefendorf* v. *House*, 9 How. P. R., 243, and cases cited; *Mackay* v. *Rhinelander*, 1 Johns. Cas., 408, 410; *Springsteed* v. *Jayne*, 4 Cow., 423; *Ogden* v. *See*, 3 How., 153; *Campbell* v. *Mesier*, 4 John. Ch. R., 334, 342, and cases cited; *Wood* v. *Keyes*, 6 Paige, 479; *Rogers* v. *Paterson*, 4 id., 409; *Vroom* v. *Ditmas*, 5 id., 528; *Bank of the U. S.* v. *Weisiger*, 2 Peters' Rep., 481; *Davies* v. *Davies*, 9 Vesey, 461.) The cause was properly continued. (2 R. S., 388, § 14.)

ALLEN J. Section 237 of the Code authorizes an action by the sheriff to collect any notes or other evidences of debt, and the debts that may have been seized or attached under a warrant of attachment. It follows that the sheriff could have had an action against Ripley & Cameron for the subscriptions to the capital stock of the Glenville Woolen Company. Actions having been brought by the company before the service of the attachments, it was his right to assume the prosecution of those actions and carry on the same, either in his own name or the name of the original plaintiff. By section 238, these actions could be prosecuted by the plaintiffs in the attachment proceedings upon giving the sheriff a bond, conditioned as prescribed by that section. This was done by Isham and others, excluding Cousinery & Craig, who were attaching creditors. But this action of Isham and others, whether with or without the act and assent of Cousinery & Craig did not conclude them, or operate as a bar to their claim as attaching creditors. Until the debts were collected and appropriated to the payment of the attaching creditors in the order of their priority or as they should claim and were entitled, the debts were still held under the attachments for the benefit of whosoever should prove to be

entitled. The debts were in the custody of the law, impounded to answer the claims of the creditors. The rights of the respective creditors and claimants depended upon the priority of the service of their respective attachments, and upon disputed questions of fact which could not be determined in any of the pending actions. The right of Cousinery & Craig to bring an action to assert their right to the benefit of the pending action and the debts which had been attached, can hardly be doubted. Isham and others, were, by the prosecution of the actions for the recovery of the debts, asserting and exercising a claim adverse to and in exclusion of Cousinery & Craig, and the right of the sheriff to interfere with the acts of Isham and others, who were proceeding pursuant to section 238 of the Code, was at least doubtful. But he was in the nature of a stakeholder, and responsible to the party, legally entitled, for whatever should be collected in the pending actions. He was a proper party to bring this action against all the adverse claimants of the fund; and had he in his own right and for his own protection brought the action as an action in the nature of a bill of interpleader, Cousinery & Craig would have been necessary parties. But the latter parties brought the action, assuming to do so under the provisions of section 238 of the Code, and it was really their action, and they would have been bound by a judgment adverse to their claim. But there is no objection that Cousinery & Craig were necessary parties, and hence such objection, even if it might have been taken, was waived, as was also another objection now taken, that the sheriff had not legal capacity to sue. (Code, section 144.) The merits of the claims of the several litigants were put at issue and fairly tried, and upon conflict and doubtful evidence the court below has decided the questions of fact adversely to the defendants, and has adjudged that the attachment of Cousinery & Craig alone was properly served, and that they alone had acquired a lien upon the debts. These parties could not be and were not estopped from asserting their claim or bringing their action by the

acts and dealings of the sheriff and the other claimants. If the sheriff was negligent in the performance of his duty and omitted to serve the other attachments, or made a false return, the remedy is against him and not against Cousinery & Craig, or by subverting their legal rights. The judgment upon the merits should be affirmed.

Whether O'Brien should have been substituted as the plaintiff upon the decease of Orser may be doubtful, but it is not a very material question. Cousinery & Craig were the parties in interest in the Orser action, and also in the action as continued in the name of O'Brien, and are, by the judgment upon the merits, entitled to the benefits of the judgment. They might, under the notice of motion, have been made the plaintiffs in form upon the death of Orser, and, perhaps, that would have been the better course. But O'Brien, as the successor of Orser, was also a proper party as the official successor of Orser and trustee for all concerned.

The judgment of the court below only gives to Cousinery & Craig the amounts recovered for the debts and interest against Ripley & Cameron. The costs recovered in these actions belong to the attorneys or the parties prosecuting the action. Cousinery & Craig are not entitled to the costs included in the judgments against Ripley & Cameron.

The judgment thus interpreted is affirmed.

All concur.

Judgment affirmed.

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GEORGE W. MILLER, Respondent, v. JOHN P. WHITE et al., Appellants.

The trustees of a manufacturing corporation organized under the act to authorize the formation of corporations for manufacturing and other purposes (chapter 40, Laws of 1848) are neither parties nor privies to a judgment against the company; and where, in consequence of a failure to make and file an annual report as required by section 12 of that act, they have become liable to pay the debts of the company, and an action is brought against them to enforce that liability and collect a debt due from the company, proof of the recovery of such a judgment thereon is neither conclusive nor *prima facie* evidence of the debt.

(Argued April 17, 1872; decided November 12, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff entered upon a verdict; also affirming an order denying a motion for a new trial. (Reported below, 57 Barb., 504, and 59 id., 434.)

This action was brought against the defendants, as trustees of the "Gutta Percha Manufacturing Company," a corporation organized under the act to authorize the formation of corporations for manufacturing and other purposes (chapter 40, Laws of 1848), as amended, seeking to make them liable for a debt against the company under the provisions of section 12 of said act, because they had failed to make and file the annual report required by that section. The complaint set forth the recovery of a judgment against the company for $24,734.62; that execution was returned unsatisfied, and that said judgment is unpaid and in full force. Upon the trial, and before the taking of any testimony, defendants' counsel moved for a dismissal of the complaint upon the ground that it did not set forth any original cause of action against the company. This motion was denied and the ruling excepted to. The judgment roll was offered in evidence and received under exception. The court held the judgment conclusive against the defendants, and directed a verdict for the amount thereof, which was rendered accordingly.

Statement of case.

H. Sheldon for the appellants. The original indebtedness should have been averred and set forth in complaint, and the judgment is no evidence against defendants. (*Strong* v. *Wheaton*, 38 Barb. 617; *Moss* v. *McCulloch*, 5 Hill, 131; *Witherhead* v. *Allen*, 3 Keyes, 562; *McHarg* v. *Eastman*, 4 Robt., 636; S. C., 7 Robt., 137; *Belmont* v. *Coleman*, 21 N. Y., 96.) And the objection is properly made at the trial. (*Coffin* v. *Reynolds*, 37 N. Y., 640.)

L. A. Fuller for the respondent. If there were technical defects in complaint, it was proper practice to receive the proofs, and if no case was made, to nonsuit. (*Lounsbury* v. *Purdy*, 18 N. Y., 520; *Pratt* v. *H. R. R. Co.*, 21 N. Y., 313, 314; Code, § 173; *Miller* v. *White*, 8 Abb. Pr., 46.) A judgment against a corporation is conclusive evidence of a debt of the corporation in an action against a stockholder, unless impeached for fraud. (*Slee* v. *Bloom*, 20 Johns., 669; *Moss* v. *Oakley*, 2 Hill, 265; *Moss* v. *McCulloch*, 7 Barb., 279; *Andrews* v. *Murray*, 9 Abb. Pr., 8, 14; *Peckham* v. *Smith*, 9 How. Pr., 436; *Belmont* v. *Coleman*, 1 Bosw., 188; *Squires* v. *Brown*, 22 How. Pr., 35, 39, opinion of the court per WOODRUFF; *Conklin* v. *Furman*, 8 Abb., 161, N. S.; *Nimmons* v. *Tappan*, 2 Sweeney, 652; *Hovey* v. *Ten Broeck*, 3 Robt., 319; *Dayton* v. *Borst*, 7 Bosw., 115, 117, 119; *Hoagland* v. *Bell*, 36 Barb., 57; *Lewis* v. *Ryder*, 13 Abb., 5; *Miller* v. *White*, 8 Abb., N. S., 46; *Gaskill* v. *Dudley*, 6 Metc., 546, per SHAW, Ch. J.; *Holyoke Bank* v. *Goodman Paper Manufacturing Co.*, 9 Cush., 576; *Farnum* v. *Ballard Vale Machine Shop*, 12 Cush., 507, per SHAW, Ch. J.,; *Marcy* v. *Clark*, 17 Mass., 330, 335; *Utley* v. *Union Tool Co.*, 11 Gray, 140; *Dauchy* v. *Brown*, 24 Vt, 209; *Doworth* v. *Coalbaugh*, 5 Iowa, 300; *Hampson* v. *Weare*, 4 Iowa, 13; *Corse* v. *Sanford*, 14 Iowa, 235; *Chaffin* v. *Cummings*, 37 Me., 77, per SHEPLEY, Ch. J.; *Carne* v. *Bingham*, 39 id., 35; *Millekin* v. *Whitehouse*, 49 id., 527; *Merril* v. *Suffolk Bank*, 31 id., 57, 60; *Cross* v. *Law*, 6 M. & W., 217; *Bank of A.* v. *Nias*, 4 Eng. L. & Eq., 252.)

A judgment is in itself a debt. (Jacobs' Law Dic., title "Debt;" Chitty on Pr., 108, 109; *Sayre* v. *Austin*, 3 Wend., 496.) The judgment being conclusive, the allegation was sufficient. (*Peckham v. Smith*, 9 How., 436; 21 N. Y., 101.)

PECKHAM, J. The statute under which the defendants' liability is claimed, after requiring a report from the company of its condition to be made, filed and published annually, within twenty days from the first day of January, declares that if any company "shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made." (Laws of 1848, p. 57, § 12; 2 R. S., 5th ed., 661.)

The report to be "signed by the president and a majority of the trustees, and be verified by the oath of the president or secretary."

Upon the trial the plaintiff proved the recovery of a judgment against the company for the amount claimed in this action, and the court held that recovery not only *prima facie* but conclusive evidence against these defendants of the debt against the company.

It will be perceived that this is a highly penal act, extremely rigorous in its provisions.

It is absolute that the trustees shall be liable for all the debts of the company, if the report be not made, no matter by whose default. If one of the trustees did all in his power to have it made, yet if the president or a sufficient number of his co-trustees to constitute a majority declined to sign it, or if the president and secretary declined to verify it by oath, the faithful trustee seems to be absolutely liable as well as those who refuse to do their duty.

A subsequent section makes the trustees liable for the company's debts if they pay a dividend not earned, but allows a trustee to escape that liability if he showed his dissent to the dividend in the manner therein provided.

But no qualification is made to this liability.

Opinion of the Court, per PECKHAM, J.

Various questions arose at the trial and have been discussed here, but a decision of this one, as to the effect upon these parties of this judgment against the company, will dispose of the case.

The statute declares this liability to be for "all the debts of the company" then existing. It may be urged with some plausibility that this judgment was certainly "a debt of the company," and for that the defendants were therefore liable.

In *Slee* v. *Bloom* (20 J. R., 669), this view seems to have been taken by Judge SPENCER as to a statute in this respect of similar terms.

The answer, I think, is, that as against these defendants that judgment did not legally exist, as they were neither parties nor privies to it.

Ordinarily, too, a judgment merges in itself the consideration upon which it was founded, and no action could subsequently be maintained on such consideration.

The same answer should be given to this position. It is not a judgment as to these defendants; no action could be maintained thereon against them.

It is scarcely sound to say that whatever is a debt against a third person (this company), is a debt against these defendants. A judgment against a third person, though void for fraud or collusion as to others, is valid against the judgment debtor This is clearly so as to individuals, if not as to corporations.

It is conceded in all the cases that the judgment would be invalid as against these defendants if recovered by connivance —by fraud.

The right of action in this case arose, if ever, at the expiration of the twenty days from the first day of January, 1865. At that time the judgment had no existence. It was not recovered until June, 1866.

It is true that the plaintiffs aver defaults in the company in making said reports for the years 1866, 1867 and 1868, but no evidence was given of any default except in January, 1865.

Instead of prosecuting these defendants, the plaintiff, in 1865, and more than eight months after the right of action, accrued against these defendants, if it ever accrued, commences a suit against the company, and then claims that that judgment is conclusive against these defendants, as much so as if recovered against them, so far as regards the validity of the debt and its amount.

There is no statute, so far as I am aware (we have been referred to none), that makes any such recovery a prerequisite to a recovery in the action against the trustees.

Then why not sue the parties from whom it is intended to collect the judgment?

I have said that these defendants were neither parties nor privies to the judgment against the company. It is clear they were not parties; that judgment was against "The Gutta Percha Manufacturing Company" alone.

Were they then privies? There is no privity of blood, nor is there of interest. There is a privity of interest, at most, only as to the corporate property. The stockholders, who in this respect stand the same as the trustees, are bound by the judgment to the full extent of their interest in the company assets. (See as to privies *Campbell* v. *Hall*, 16 N. Y., 578.) The trustees represent the stockholders as to nothing but the corporate property. They were chosen for nothing else, and are vested with no other power.

So a judgment against representatives is not binding upon the heirs. (*Moss* v. *McCullough*, 5 Hill, 131; C. & H. notes to Ph. Ev., 921, 982; *Wood* v. *Byington*, 2 Barb. Ch. R., 392, 393; *Sharpe* v. *Freeman*, 45 N. Y., 802.) The analogy as to privity in the case at bar is very strong. There is quite as much ground for holding the heirs bound by a judgment against executors as for holding a judgment against the company to be binding upon the trustees.

In *Moss* v. *McCullough* (5 Hill, 131) Judge COWEN holds that stockholders made liable by statute, in certain cases, for the debts of the company upon failure of its assets, occupy the position of sureties to the company; and the court in

that case hold, in a well-reasoned opinion, that the stockholders are not bound by the judgment against the company.

It was afterward held that the stockholder was a principal debtor in such case, where made jointly and severally liable for the debt, though only after an execution returned unsatisfied against the company. (*Harger* v. *McCullough*, 2 Den., 119; *Moss* v. *McCullough*, 7 Barb., 295.)

If the stockholder be a surety, the judgment against the principal does not bind him. (See the case 5 Hill, 131, *supra*.)

This court has decided the principle in *Decker* v. *Judson* (16 N. Y., 439; *Thomas* v. *Hubbell* (15 id., 405).

If he be a principal debtor with the company, each severally liable, then a judgment against one party, severally liable, has no force against another who is also severally liable.

If only jointly liable and sued separately, the judgment against the one discharges the other entirely at common law, not under our Code. If the other party jointly liable be joined in the suit, but not served, then the judgment concludes him as to the amount, when his liability is established. Would a judgment against any or all of these defendants be any evidence in a suit against the company of the debt? Clearly not, though each judgment is against a principal liable for the debt.

In the case at bar, the defendants are strictly neither principal debtors with the company, nor sureties. The statute simply imposes a penalty upon them for the omission of a prescribed duty. It compels them to pay the debt of another.

I admit that there is as much ground, as a general rule, for holding these defendants as for holding stockholders—but not necessarily more. They do not necessarily have notice of the suit against the company, if one be brought. Service may be made upon some other officer. In this case, I think each of these defendants swears that he never heard of the suit against the company until this suit was commenced. I do not mean to say that the defendants might not have been bound by that judgment by their conduct in the actual defence of that suit against the corporation.

But if they have notice as trustees, there may be reasons for not defending, which would not exist if the suit were against them personally. The company may be without property, the debt as claimed may be just, and they suppose that the plaintiff will take judgment only for that sum, there is reason for supposing that the claim in this case was for less than the judgment recovered against the company.

There is no hardship in requiring a party to prove his case against these defendants. If he has sold the company goods, loaned it money or rendered it service, it is easily proved in this action. It seems to me that connivance and fraud are prevented by requiring such proof.

There are many contradictory decisions in this State upon this liability. I do not deem it profitable to review them. This court has been divided upon it, although in *Belmont* v. *Coleman* (21 N. Y., 96) a majority of those present seemed against it.

The decisions in the New England States have very little bearing, as they are founded upon entirely different statutes, generally making the stockholders judgment debtors by a recovery against the company and allowing execution thereon to be levied upon their property. (*Marcy* v. *Clark*, 17 Mass., 330.)

So of Iowa, although I admit that those courts have gone much farther in holding members of a corporation or *quasi* corporation for a judgment against it, than is held in our State.

Nor is the judgment *prima facie* evidence of the debt as against these defendants. There are many loose expressions to the contrary in the cases. Judge WILLARD, in the case in 7 Barb., makes the remark that it is at least *prima facie* evidence. This was said after endeavoring to prove that it was conclusive.

There is no ground whatever for holding this judgment binding upon these defendants, except upon the principle of *res adjudicata*. It is a judgment, and there is no element about a judgment of a *prima facie* character. As a judg-

ment upon the point, it is necessarily absolute and conclusive—a statute sometimes makes it *prima facie* merely. In any other case, it cannot be other than conclusive, if evidence at all. That is the inseparable character and nature of a judgment. It binds all parties and privies, whom it binds at all, upon the ground that that matter has been judicially examined by a competent tribunal and its judgment pronounced thereon. The judgment of another court thereon adds nothing to its finality. This is elementary. The authorities at this day are clear as to the effect of a judgment. (*Kingsland* v. *Spalding*, 3 Barb. Ch. R., 341; *Castle* v. *Noyes*, 14 N. Y., 329; *Doty* v. *Brown*, 4 id., 74.) It is not necessary to multiply authorities.

It has been held in some cases that a judgment is only *prima facie* when it is not pleaded where it might have been; that the party has thus waived it as an estoppel. The better opinion is the other way, in reason and authority. (1 Greenl. Ev., 522–538, inclusive, and cases cited.) In the case at bar the judgment is pleaded. (*Bank* v. *Nias*, 4 Eng. Law & Eq., 252.)

The question involved in this case is not free from doubt or difficulty. It is not decided in this court, although the principles involved, I think, have been. (See *Witherhead* v. *Allen*, 3 Keyes, 562.) That necessarily holds that the judgment does not bind a stockholder. I think the principles of the law are better sustained by holding this judgment not evidence against these defendants; that they are neither parties nor privies to it, and that they should not be bound by it; that for this, as for other claims, they should be personally served with process, and given an opportunity of trying the question of debt. I do not consider either of the other questions, as they may not recur on another trial.

The judgment should be reversed and new trial ordered, costs to abide the event.

All concur.

Judgment reversed.

Statement of case

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GEORGE C. GLACIUS et al., Respondents, *v.* BESSIE BLACK, Appellant.

Where one enters into a contract to furnish materials and perform work of a specified character, to be paid for upon performance, although materials may be furnished and the work performed, yet if not done in the manner stipulated, no action will lie for the compensation; a substantial performance must be shown, unless it has been waived or released. The right to recover will not be forfeited, however, by reason of technical, inadvertent or unimportant omissions or defects; whether the defects are substantial, or technical and unimportant, is a question of fact.

Where, by the terms of a contract for the repair of a building, it is stipulated that the materials shall be of the best quality and the work performed in the best manner, subject to the acceptance or rejection of an architect, all to be done in strict accordance with the plans and specifications, and to be paid for when done completely and accepted, the acceptance by the architect of a different class of work or of inferior materials will not bind the owner, and does not relieve the contractor from the agreement to perform according to the plans and specifications.

The provision for acceptance is an additional safeguard against defects not discernible by an unskillful person.

The case of *Wyckoff* v. *Meyers* (44 N. Y., 143) distinguished.

(Argued April 16, 1872; decided November 12, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts are set forth sufficiently in the opinion.

George A. Black for the appellant. A partial performance of an indivisible contract does not extinguish a corresponding proportion thereof, unless the benefit of such performance is voluntarily retained by the creditor. (Civil Code, § 629; Sedgwick on Damages, 212, 215, 216, 222, note 1, 221; *Ladue* v. *Seymour*, 24 Wend., 60; *Moffet* v. *Sackett*, 18 N. Y., 527; *Davis* v. *Talcott*, 12 id., 188; S. C., 14 Barb., 611; *Clark* v. *Marsiglia*, 1 Den., 317; *Dillon* v. *Anderson*, 43

Statement of case.

N. Y., 232; *Masterton* v. *City of Brooklyn*, 7 Hill, 71; *Durkee* v. *Mott*, 8 Barb., 423.) The work being affixed to real property, the use and occupation of it by the owner does not amount to a voluntary retention. (*Smith* v *Brady*, 17 N. Y., 173.) Contracts are to be enforced as the parties made them. (*Brown* v *Curtis*, 2 N. Y., 227; *Pike* v. *Butler*, 4 id., 362; *Pullman* v. *Corning*, 9 id., 97; *Smith* v. *Brady*, 17 id., 173; *Cunningham* v. *Jones*, 20 id., 486; *Bonesteel* v. *Mayor, etc.*, 22 id., 167; *Tompkins* v. *Dudley*, 25 id., 272; *Walker* v. *Millard*, 29 id., 379; *Brown* v. *Weber*, 38 id., 188; *Roberts* v. *Opdyke*, 40 id., 264; *Ely* v. *Spofford*, Court of Appeals [Transcript, Jan. 21, 1870]; *Jackson* v. *Topping*, 1 Wend., 396; *Bird* v. *Smith*, 12 Q. B., 781.) Waiver, as applied to contracts, is in fact a new contract. (*Ripley* v. *Ætna Ins. Co.*, 30 N. Y., 136; *Gardiner* v. *Clark*, 21 id., 404; *Cromwell* v. *Haight*, id., 462.) The intention to waive must be clear. (*Roberts* v. *Opdyke*, 40 N. Y., 264; *Pike* v. *Butler*, 4 id., 360.) Plaintiffs have failed to complete their contract, and the judgment should be reversed. (*Griffen* v. *Marquardt*, 17 N. Y., 28; *Edmonston* v. *McLoud*, 16 id., 544.)

W. W. Niles for the respondents. A substantial performance of a building contract is all the law requires. (*Smith* v. *Gugerty*, 4 Barb., 614; *Smith* v. *Brady*, 17 N. Y. 173; *Sinclair* v. *Talmadge*, 35 Barb., 602; *Colwell* v. *Lawrence*, 24 How. Pr. R., 324; *Thomas* v. *Fleury*, 26 N. Y., 32.) Defendant assented to the work as it was being performed, and so accepted it. (*Watson* v. *Gray*, 41 N. Y., 385; *Colwell* v. *Lawrence*, 24 How. Pr. R., 324; *Pike* v. *Nash*, 38 N. Y., 335; *Smith* v. *Brady*, 17 id., 173; *Sinclair* v. *Talmadge*, 35 Barb., 602.) Defendant, by allowing plaintiffs to go on after the time limited, waived the forfeiture she might have claimed. (*Cox* v. *Bennett*, 1 Greene, 165; *Sinclair* v. *Talmadge*, 35 Barb., 602; *Watson* v. *Gray*, 41 N. Y., 385; *Colwell* v. *Lawrence*, 24 How. Pr. R., 324; *Smith* v. *Brady*, 17 N. Y., 173.) The architect's certificate bound the parties. (*Butler* v. *Tucker*,

24 Wend., 447; *Sinclair* v. *Talmadge*, 35 Barb., 602; *Smith* v. *Brady*, *supra*; *Oakes* v. *Moore*, 11 Shep., 214; *Wyckoff* v. *Meyers*, 44 N. Y., 143.)

CHURCH, Ch. J. This is an action upon a claim filed under the mechanics' lien law. The contractors are builders, and contracted to make certain alterations and repairs upon the defendant's house for $1,326; one-half to be paid when the lath were on, and the balance when the work was done completely and accepted. The work consisted principally of taking off an old peak roof and substituting a French or Mansard roof and finishing off the upper story, and making other repairs in the interior of the house. The case was tried before a referee, and is very voluminous. The original report contains fifty-eight distinct findings of fact, besides the conclusions of law, and when the case was made the referee again stated the facts found by him in fifty-nine findings, which are followed by forty-one findings of law, to each of which an exception is taken. The learned judge who delivered the opinion in the court below regarded these last fifty-nine findings of fact as additional to those stated in the original report, but it is not very clear whether they were intended as additional findings or substitutes for those contained in the report. At the close of the first findings, the case states "and hereupon the said owner, for the purpose of a review of the evidence appearing upon the trial, makes the foregoing case, and the said referee states the following as facts found by him." From this it would appear that the last findings were revised substitutes for the first; but in the course of these findings the referee refers to certain findings contained in the original report, and it is probable that it was intended that all of them should go into the case. If the learned referee had been more concise and brief, and had incorporated less extraneous matter in his findings, his own labor and that of the court would have been greatly lessened. Neither evidence, argument nor comment has any legitimate place in findings of fact or law. They should be conclusions

of fact from the evidence and conclusions of law from the facts found, and both stated without repetition, and in the most concise and direct manner. The referee found for the plaintiffs the whole amount of the claim, less twenty-five dollars, which he found as damages for defective work and materials.

The findings of fact, if supported by any evidence, are conclusive upon this court, and we can only deal with the legal questions involved. A reference to some general principles of law will aid in elucidating the controlling points in the case. It is well settled in this State that where a party has entered into a contract to perform work and furnish materials of a specified character, and the other party agrees to pay for the same upon the performance of the contract, although the work may be performed and materials furnished, yet, if not done in the manner stipulated, no action will lie for compensation. When performance is a condition of payment the former must be shown to entitle a party to recover unless it has been waived or released. The case of *Smith* v. *Brady* (17 N. Y., 173), reviewing the principal authorities on the subject, is full and explicit on this point. This is a general rule, applying to contracts of this character as well as others. As was said in the above case, "There is, in a just view of the question, no hardship in requiring builders to perform their contracts in order to entitle themselves to payment where the employer has agreed to pay only on that condition." As, however, this class of contracts embrace many particulars which it is difficult, if not impracticable, to comply with, with entire exactness, the apparent rigor of the general rule has been so far relaxed as that a substantial compliance will be deemed sufficient. As was properly expressed by ALLEN, J., in *Sinclair* v. *Talmadge* (35 Barb., 602), "If there has been no willful departure from the terms of the contract, or omission in essential points, and the laborer has honestly and faithfully performed the contract in all its material and substantial particulars, he will not be held to have forfeited his right to remuneration by reason of mere

technical, inadvertent or unimportant omissions or defects. The law imposes no such liability, and enforces no such penalty." The question in each case will, of course, be an open one, where defects exist, whether they are substantial or technical and unimportant. This is a question of fact. The referee has found that defects existed, but has not passed upon the question whether they were substantial so as to defeat any right of action, or so trivial and unimportant as to require the application of the modified rule before stated; nor has he furnished any guide by which we can, as a question of law, determine that question, except that he finds that the plaintiffs intended in good faith to perform their contract. The referee finds, in the fiftieth clause of what are called special findings, "That the work was never completed by the claimants according to the plans and specifications in the respects found by me in my report, or specially found by me herein."

The defects thus found are quite numerous, and embrace defects in materials and workmanship, in the plastering, the walls were out of plumb, the windows were too narrow, an omission to put sills under cross partitions; there was some leakage; folding doors were too narrow and too short; an omission to replace lightning-rods, torn down to perform the work; defective materials and workmanship in the mouldings and casings, and some other similar defects. As to some of the defects, the referee found that they had been waived, or should have been objected to while the work was progressing; as to others, that there was no evidence of damages by reason of them; and, as to others, he allowed compensation in damages, but did not find whether they were of such a material character as to preclude a recovery or not; nor, upon the theory upon which he determined the case, was it essential that he should do so. That theory was that, by the terms of the contract, the architect had power to bind both parties by his acceptance of the work and materials so far as to enable the plaintiffs to maintain an action, that the architect superintended the work and accepted it after it was com-

pleted, and that the defendant was bound thereby to pay for it, less the value of the defects proved.

After an examination of the case I do not think this proposition can be sustained. In the first place, the contract confers no power upon the architect to change or alter the plans and specifications; nor is there any provision, found in many such contracts, that the decision of the architect shall be final and conclusive upon the defendant. The contract provides "that the materials to be furnished shall be of the best quality, and the workmanship performed in the best manner, subject to the acceptance or rejection of Edward Wall, architect, and all to be in strict accordance with the plans and specifications, which are signed by the parties of the second part, and form part of this contract." The architect also had power to reject any particular work or materials; and in such case the builders were to remedy the defects. This is all the authority which the architect had under this contract, and his authority was equally known to both parties. It is quite clear to my mind that the acceptance of the work by the architect did not relieve the plaintiffs from their agreement to perform this work according to the plans and specifications. The provisions are distinct and independent. The contract was to be performed in a certain manner, particularly specified in writing; and, in addition, it was to be subject to the acceptance or rejection of the architect; but his acceptance of a different class of work or inferior materials from that contracted for would not bind the defendant to pay for them. She was obliged to pay only where "the work was done completely *and* accepted." The provision for acceptance was an additional safeguard against defects not discernible by an unskilled person.

This principle was substantially held in *Bird* v. *Smith* (64 E. C. L. R., 785), where the contract was for the sale and delivery to the plaintiff of a quantity of iron rails of certain weights, shapes and dimensions, and to be inspected and certified as then agreed upon, and in quality equal to any rails made in Staffordshire. A plea that the rails were inspected,

certified and approved by an agent of the plaintiff's, as provided in the contract, was held bad on demurrer on the ground (among others) that "each stipulation is, in its terms, distinct, and, in its nature, as an absolute warranty for quality, may well be required, in addition to a provision for inspection and approval, to guard against defects which inspection cannot discover."

In *Wyckoff* v. *Meyers* (44 N. Y., 143), where it was held that the certificate of the architect was conclusive upon both parties, the contract provided that payment should be made upon the certificate of the architect; and it was also provided that disputes respecting the construction and meaning of the drawings and specifications should be submitted to the architects, whose decision should be conclusive upon the parties. Every contract must be construed by its own terms, and, I think, the true construction of this contract is, that the provision subjecting the work and materials to the acceptance of Mr. Wall was for the benefit of the defendant as an additional protection to the agreement, on the part of the builders, to perform the work according to the plans and specifications, and such seems to have been the understanding of both parties by the course of evidence on the trial. The acceptance by the architect would be important in establishing that the work and materials were in compliance with the contract, but would not be sufficient to sustain a recovery if it appeared that the contract had not been substantially performed.

We cannot determine whether this construction of the contract would have changed the result at the trial before the referee or not, because the referee did not consider or pass upon the question of substantial performance, but held that such performance was established by the acceptance of the architect, so far as to enable the plaintiff to maintain the action. In this he erred. But I cannot agree that there was such acceptance of the work by the architect as to bind the defendant, even if he had authority to bind her. The facts, upon which the referee found that the architect accepted the work, are stated in the report, and are embraced in numerous

specifications; but so far as material are, substantially, that the architect did not see the work during the taking down of the old roof, erecting the studding and putting up the new roof, nor the partitions of the attic floor, or before the lath and plastering were on, and that he only saw the work, on an average, about once a week; that about the time the work was finished he and one of the claimants went over a portion of the work together in the absence of the owner, but did not thoroughly examine the work; that he pointed out certain things to be done, and on the next day the other claimant went to the house to do the things which his co-claimant stated that the architect pointed out, but did not do all of them; that a day or two afterward, the architect not having seen the work meantime, met one of the claimants in the street and asked him if the things he had specified had been done; that the claimant replied that they had, and asked for a certificate, which the architect promised to give in a few days, after he had been over to see the work; "that afterward the claimants called again upon the architect at his home for the certificate, and that he told them that he had not seen the work yet and promised to leave a certificate at the claimants' house in a few days after he had been over to see the work, and at the same time advised the claimants to go and compromise with the owner, and if they could not make it out (the settlement) he would give the certificate anyway;" that the architect did not know of the objections of the owner to the work, and on making a thorough examination he was of opinion that the work was inferior in quality and in workmanship and did not comply with the contract in all respects, and never gave the certificate or otherwise accepted the work.

Conceding the power claimed for the architect, these facts fail to establish such an acceptance as would foreclose the defendant. At most, it was only a promise to accept, and that, too, in substance after a subsequent satisfactory examination of the work. The work was not satisfactory when the examination was subsequently made. But if the acceptance had been unqualified and a certificate given without knowing

the facts concerning which a subsequent examination showed he was mistaken, the acceptance and certificate would have had no binding force. Fraud or mistake vitiates the certificate in those cases where a certificate is otherwise conclusive. (44 N. Y., *supra.*) So that, in any point of view, the referee erred in holding that the defendant was in any degree prejudiced in her defence by what was said or done by the architect upon the subject of the acceptance of the work. There are other conclusions stated in the numerous findings of the referee to which I cannot fully assent, but which are comparatively subordinate, and as there must be a new trial I do not deem it material to examine them. It is not intended, in the views above expressed, to decide or intimate an opinion that the claimants are not entitled to maintain this action and recover the contract price, less such reasonable damages as the defendant has sustained by reason of the defects and omissions appearing in the work or materials. If the claimants acted in good faith, and honestly performed the contract in all substantial particulars, they should not be compelled to forfeit the whole payment by reason of inadvertent or slight defects. So, too, the plaintiffs may recover if the defendant, by herself or authorized agent, has waived full performance, or consented to accept the work subject to deductions for defects. On the other hand, if these defects and omissions are so numerous and pervading as to show that the whole job was done in a slovenly and improper manner, not conforming substantially with the plans and specifications, and there has been no waiver, there is no rule of law or morality which entitles the claimant to compensation. From the nature of the case it cannot be difficult to reach a just result at another trial, or even by a proper spirit of accommodation on the part of the parties themselves to arrive at such a result, without further litigation or expense.

The point is made by the appellant that the judgment should be reversed without a new trial, claiming that the lien has expired, and no personal judgment can be ren-

dered against the defendant. This position is not tenable. If the lien has expired the action can still be prosecuted as a personal action, The twentieth section, as amended in 1871, is explicit in retaining the lien, but it is unnecessary to determine now whether the lien continues or not.

Judgment reversed and new trial granted, costs to abide the event.

All concur, except GROVER, J., not voting.

Judgment reversed.

CHARLES GOODWIN et al., Respondents, *v.* THE BALTIMORE AND OHIO RAILROAD COMPANY, Appellant.

Where bulky articles of freight are landed from a vessel in the customary manner upon a public wharf, with due notice to the consignee (he being the owner), who pays the freight and takes steps toward removing them, and is afforded a reasonable opportunity of doing so, the legal custody is transferred to him, and if he unnecessarily delays the removal, he does so at his own risk. It is his duty, not the carrier's, to protect them, and if they are injured by inclement weather, the carrier cannot be held responsible.

(Argued April 19, 1872; decided November 12, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiff entered upon a verdict. (Reported below, 58 Barb., 195.)

The action is brought to recover damages alleged to have been sustained by the plaintiffs, through the negligence of defendant, in not caring for and protecting from rain a lot of sheet iron consigned to plaintiffs, which had been brought from Baltimore in the steamer Carrol, belonging to the defendant.

The Carrol arrived at her wharf, pier No. 13, East river, on the 4th or 5th of September, and immediately sent notice to the plaintiffs, whose store was less than eighty rods distant from the pier, and landed the iron on the pier in the usual way in which iron is landed. A part of the iron was piled

on the side of the pier near the street (South street), and the residue in two piles at the south-easterly end of the pier. It was piled in a space by itself, and separate from all other cargo. That part which lay near the street was taken away by the plaintiffs.

The vessel began discharging freight Monday and finished Wednesday. On Friday a heavy shower occurred, by which the iron was wet and rusted. The iron could have been removed in one day. Other facts appear in the opinion.

John Slosson and *A. J. Parker* for the appellant. The judge erred in his charge to the jury, in making the convenience of access to the goods a test of perfect delivery. (Ang. on Carriers, §§ 313, 315; *Fisk* v. *Newton*, 1 Den., 45; *Richardson* v. *Goddard*, 23 How. U. S., 39; *Miller* v. *Steam Manufacturing Co.*, 6 Seld., 438; *Ely* v. *N. Haven St. Bt. Co.*, 52 Barb., 214, 215; *Price* v. *Powell*, 3 Coms., 322; Flanders on Shipping, § 275; *Hyde* v. *Trent. Nav. Co.*, 5 T. R., 397–400; *Redmond* v. *Liverpool, N. Y. and Phila. Steamship Co.*, Court of Appeals [N. Y. Transcript, March 30, 1872]). After receiving notice, the consignee is bound to take care of the goods and carry them away. (Story on Bail., § 545, citing, 4 Pick., 371, 1 Rawle, 203; *Roth* v. *Buff. and S. L. R. R.*, 34 N. Y., 553; *Richardson* v. *Goddard*, 23 How. U. S., 39.) The judge erred in refusing to charge that defendant was not obliged to warehouse the goods. (*Roth* v. *Buff. and S. L. R. R.*, 34 N. Y., 548; *Gould* v. *Chapin*, 20 id., 267; *Miller* v. *Steam Manuf. Co.*, 10 id., 438; *Fisk* v. *Newton*, 1 Den., 45; *Ostrander* v. *Brown*, 15 J. R., 39.) Gratuitous bailees are only responsible for gross or culpable negligence. (Jones on Bail., 8; *Tompkins* v. *Saltmarsh*, 14 S. & R., 275; Ang. on Carriers, §§ 17, 26, 295, 304, 323; *Shiells* v. *Blackburne*, 1 H. Black., 158.)

C. M. Briggs for the respondents.

RAPALLO, J. Where bulky articles of freight are landed from a vessel in the customary manner upon a public wharf,

with due notice to the consignee, and he thereupon pays the freight and takes steps toward removing them, and is afforded a reasonable opportunity to do so, but unnecessarily delays that operation, and in consequence of such delay on his part they are injured by inclement weather, the carrier cannot be held responsible for such injury. It is not his duty to store the goods after the consignee has paid the freight and signified his intention to remove them, and is apparently about to do so. If, after the consignment has been thus accepted and the goods have been separated from the rest of the cargo and the consignee has been afforded a reasonable time to remove them, he voluntarily or negligently allows them to remain upon the wharf, he does so at his own risk, and it is his duty and not the carrier's to protect them from the weather.

Where, instead of being landed upon a public wharf, the goods are placed in a depot or storehouse or other premises of the carrier, they being in his actual custody, he is bound to take ordinary care of them, notwithstanding unreasonable delay by the consignee in removing them. And where the consignee cannot be found, or after notice refuses to receive the goods, the carrier is bound to take care of them or put them in a place of safety for the benefit of the consignor or owner.

In all these cases, after his duty as carrier has been discharged, he becomes a species of involuntary bailee, and his only means of relieving himself of the custody of the goods is by placing them in the hands of some responsible warehouseman.

But the principle of these cases does not apply where the consignee is present, accepts the consignment and pays the freight, and the goods are landed on a public wharf, with notice to him, and he is afforded a reasonable time and opportunity to take charge of and remove them. Their legal custody is then transferred from the carrier to the consignee, at least where the latter is owner of the goods, or bound to accept them. (*Chickering* v. *Fowler*, 4 Pick., 371; *Cope* v.

Cordova, 1 Rawle, 203.) Whether in a case where the consignee was not the owner the carrier would owe any further duty to the true owner in case of the neglect of the consignee to remove the goods, it is not now necessary to consider, this action being between the carrier and the consignees.

In the present case, the parcel of sheet iron in question lay separated from the rest of the cargo and piled up by itself at the end of the pier (which was a public wharf), for several days after notice to the consignees of its arrival. They had paid the freight upon it at the time of receiving the notice, and had sent their carman several times to remove it and had removed another parcel of the same consignment. The main contest at the trial was upon the point whether a reasonable opportunity had been afforded to the plaintiffs to remove the parcel in question, before the storm by which it was injured, the claim upon the part of the plaintiffs being that the defendant had so obstructed the wharf with other portions of the cargo that the carman could not remove the parcel in question before the storm, and the defendant controverting this and claiming that the omission of the carman to remove it was owing to his own negligence and misconduct, and that with proper diligence he had ample time to remove it before the damage occurred. The evidence upon these points was conflicting, and they were submitted to the jury. The judge in the first instance complied with the request of the defendant's counsel to charge the jury that if the plaintiffs had a reasonable time to remove the iron or to put it under proper care and custody before the storm they could not recover, but afterward, in delivering his charge, the judge departed from this view and charged in substance that even if the plaintiffs had a reasonable time, then from the time that the reasonable period for the removal of the goods expired the defendant became liable as warehouseman, and that if proved to have neglected to take that degree of care of the property which is required of warehousemen, it was liable, though its duty as common carrier was ended. For the reasons above stated, we are of opinion that under the circumstances of this case, the lat-

ter instruction was erroneous, and that the judge should have adhered to the first position.

The judgment must therefore be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed and new trial granted, costs to abide the event.

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THE CENTRAL BANK OF BROOKLYN, Respondent, *v.* BARNABAS HAMMETT et al., Appellants.

An individual negotiating for the purchase of a bill of exchange or promissory note from one having it in possession, and whose name appears upon it, must assume that the title of the holder as well as the liability of all the parties is precisely that indicated by the instrument.

The presumption arising from the fact of possession of a bill of exchange by the drawee and acceptor, is that it is in his possession for acceptance or after payment; such possession gives no apparent ownership or presumptive right to transfer the same. (PECKHAM, J., dissenting.)

(Argued April 19, 1872; decided November 12, 1872.)

APPEAL from the judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff, entered upon a verdict

This action is brought upon a bill of exchange, drawn by the defendants on and accepted by Balch & Co., payable to the order of the plaintiff, dated October 31st, 1868, at four months.

Balch & Co. were indebted to the defendants, and the defendants drew the draft and delivered it to the defendants on account of such indebtedness, and for the purpose of enabling the defendants to have it discounted for their own benefit.

The defendants failing to get it discounted, Balch & Co. gave defendants another acceptance for the same amount, and with instructions to have it canceled, surrendered this one to them.

Opinion per CURIAM.

Instead of doing this, Balch & Co. presented it to plaintiff for discount to procure funds to pay a note previously discounted by the bank for them.

The bank discounted the bill, passed the proceeds to the credit of Balch & Co., and out of the moneys paid the note it had.

John C. Dimmick for the appellants. To constitute a *bona fide* holder of commercial paper, it must be purchased of one either owning or apparently the owner of what he proposes to sell. (*Belmont Branch Bank* v. *Hoge*, 35 N. Y., 65; *Hoge* v. *Lansing*, 35 N. Y., 36.)

J. C. Bergen for the respondent. If the bank had paper of Mr. Balch lying over, and it was taken up by this bill of exchange, that would be no defense. (Albany L. J., Oct. 29, 1870, p. 327; 34 N. Y., 247; 40 id., 457.)

PER CURIAM. The plaintiff claims to recover as a *bona fide* holder for value of the bill in suit. A *bona fide* holder of negotiable paper is one who has acquired the title in good faith for a valuable consideration from one capable of transferring it, or from one in possession of the paper with an apparent right to transfer it, and without notice of any defect in his title or right to transfer. One who obtains the transfer of negotiable paper before maturity, and for full value, without notice of any defect in the title of the apparent owner, acquires and has all the rights of a *bona fide* holder, by title derived from the actual owner. (*Belmont Branch Bank* v. *Hoge*, 35 N. Y., 65.) The possession of a bill or note payable to bearer, or indorsed in blank by one not a party to the instrument, is presumptive evidence of ownership. But a possession of such an instrument by a party to it only authorizes a presumption of such rights and obligations of the several parties as are indicated by the paper itself. The actual relations to each other, of the several parties to the instrument, are presumed to be precisely such as the law declares, in the

absence of any special circumstance to take the instrument out of the general rule, and vary the liabilities of the parties as between each other.

An individual negotiating for the purchase of a bill or note from one having it in possession, and whose name appears upon it, must assume that the title of the holder, as well as the liability of all the parties, is precisely that indicated by the instrument; that is, he cannot assume that the person in possession has any other or different rights, or that the liability of the parties is other or different from that which the law would imply from the form and character of the instrument. (*Hoge* v. *Lansing*, 35 N. Y., 136.) The plaintiff acquired the title to the bill from Balch & Co., the drawees and acceptors, the persons primarily liable for the payment of the debt. It could only, in the ordinary course of business, and according to mercantile usage, have been in the possession of the transferrer either for acceptance or after it had been paid, and in neither case would they have had the right to transfer it. In the first case they would have had possession of it for a special purpose, and not as owners, and in the latter it would have become *functus officio*, and not capable of being again put in circulation. There was no apparent ownership in Balch & Co., or presumptive right to transfer the bill to the plaintiff.

If the paper had been made for the accommodation of the drawees, and to be used by them, that fact should have been proved.

The law will not presume the paper to have been made except in the ordinary course of business, and according to commercial usage.

The judgment must be reversed and a new trial granted, costs to abide the event.

All concur, except PECKHAM J., dissenting.

Judgment reversed.

Statement of case.

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AMANDA M. HOUSE, Respondent, v. MARY L. JACKSON et al., Appellants.

Where a husband is seized of a vested remainder expectant upon an estate for life, subject to be defeated by his own death prior to that of the tenant for life, and he purchases the life estate, this is such a seizin as gives the wife dower subject to be defeated, as above. The husband cannot alienate or encumber the estate to the prejudice of the wife's dower, nor is the same affected by the sale of the life estate upon execution against the husband.

(Argued April 29, 1872; decided November 12, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment entered upon the decision of the court at Special Term, determining the rights of the parties in a particular suit.

Partition is sought in this action of four lots of land in the city of Brooklyn.

One Samuel Jackson, being owner of the "Hay-scale farm," of which the lots in question were a part, on the 15th of February, 1832, conveyed that farm to John Jackson, "for and during his natural life, after his decease to his heirs and assigns forever."

On the 1st of April, 1844, John Jackson, the grantee for life, conveyed by quit-claim deed the same tract of land to his twelve children, Isaac Jackson, Charles C. Jackson, Rosetta Jackson, Fanny Jackson, Stephen C. Jackson, Coe D. Jackson, Parmenus Jackson, Richard Jackson, Edward Jackson, Mrs. Rosanna Baldwin, Mrs. Ann Baldwin and Jacob S. Jackson.

Charles C. Jackson, one of the said children, died before the year 1848, intestate and without issue, leaving the other eleven surviving.

On the 25th of April, 1848, the said John Jackson executed another deed of the same premises to the said surviving eleven children. This deed contained the usual full covenants of seizin in the grantor, for quiet enjoyment, etc.

Statement of case.

The said surviving eleven children executed to each other partition deeds of the same lands, by one of which, dated February 13, 1849, the other ten children, with the husbands of the married daughters, conveyed several city lots, including those now in question, to the said Edward Jackson, the husband of Mary L. Jackson, the appellant. John, the ancestor of all these children, was then still living.

By virtue of an execution issued out of the Supreme Court upon a judgment against Edward Jackson, the sheriff of the county of Kings, on the 4th day of September, 1856, sold all the estate, right, title and interest of Edward Jackson in the lots in question, with many others, to Herbert T. Moore. The said sheriff executed a deed in pursuance of the above sale, to Herbert T. Moore, dated December 5, 1857, and recorded May 25, 1859. John Jackson died in March, 1861. The said Herbert T. Moore and his wife, on the 1st of August, 1862, executed a deed of the lots in question and two others, to Amanda M. House, the respondent.

At the commencement of this suit, to wit, in February, 1869, the appellants claim to have been in possession of the premises.

After the partition between the children of John Jackson, Fanny Jackson, one of the children, married Parker Baldwin, and died in June, 1859, leaving Fanning Baldwin, her son and only child, who is still living.

John Jackson died, leaving his remaining ten children surviving. Edward Jackson died in January, 1863, subsequent to his father's decease, leaving a widow and seven children, the appellants in this case.

A partition suit was commenced January 15, 1862, by Stephen C. Jackson and others, against Coe D. Jackson and others, for the partition of the Hay-scale farm, and such proceedings were had that the lots in question, with others, were set off to Edward Jackson in severalty, in fee simple. The respondent, however, was not made a party to the suit.

The court below decided that plaintiff was entitled to ten-elevenths of the premises, and that the children of Edward

Jackson were entitled to one-eleventh, subject to the dower right of Mary L. Jackson, that the latter had no rights of dower in the ten-elevenths. The nature of the estate acquired by the children of John Jackson under the deed of Samuel Jackson is settled and determined in *Moor* v. *Littell* (41 N.Y., 66).

E. P. Wheeler and *F. J. Fithian* for the appellants. The interest of the children of John Jackson under the deed of Samuel Jackson was a contingent, not a vested, remainder. (2 R. S., chap. 1, title 2, § 132; Greenleaf's Cruise, 204, § 9 Bing. on Descents, 231, 232; *Snell* v. *Eastman*, 3 Metc., 121; 2 Story's Eq., § 1040; 1 R. S., 725, § 28; *Carmichael* v. *Carmichael*, 4 Keyes, 346; *Campbell* v. *Rawdon*, 18 N. Y., 412.) A contingent remainder cannot be sold on execution. (Code, §§ 282, 289, 462; *Sheridan* v. *House*, 4 Keyes, 589; *Jackson* v. *Middleton*, 52 Barb., 9; *Scott* v. *Scholey*, 8 East., 467; *Durando* v. *Durando*, 23 N. Y., 331.) The purchaser at the sale on execution not having obtained by the sheriff's deed more than a part of what was conveyed by the partition deed, is in a corresponding position to that which a lessee for years from Edward Jackson would have occupied. (*White* v. *Whitney*, 3 Metc., 87; *Norman* v. *Wells*, 17 Wend., 148; *Bally* v. *Wells*, 3 Wils., 25, 29; *Dickinson* v. *Hoonus*, 8 Grab., 406; *Bickford* v. *Paige*, 2 Mass., 460; *Withy* v. *Mumford*, 5 Cow., 141; 2 Preston Ab., 212.) Defendants are not estopped by the partition deed in denying title. (*Sinclair* v. *Jackson*, 8 Cow., 543, 586; *Jackson* v. *Middleton*, 52 Barb., 1; *Brewster* v. *Striker*, 2 Comst., 19.) If the estate was a vested remainder, Mary L. Jackson was entitled to dower. (2 R. S. [Edm. ed.], 691, § 1; 2 Black. Com., 177; 4 Kent Com., 99; *Doe* v. *Walker*, 5 B. & C., 1111; Wash. on Real Prop., 1208; *James* v. *Morey*, 2 Cow., 246.)

D. P. Barnard for the respondent. The life estate of John Jackson was not merged in his lifetime, in Edward's remainder. The sale of his interest in the pro-

mises before he became fully seized of an estate of inheritance defeated the claim of dower in the widow except to one-eleventh. (1 R. S., 740, § 1; 4 Kent Com., 39; *Gillis* v. *Brown*, 5 Cow., 388; *Dunham* v. *Osborn*, 5 Paige, 634; *Safford* v. *Safford*, 7 id., 259; *Bear* v. *Snyder*, 11 Wend., 592; *Beekman* v. *Hudson*, 20 id., 53; *In re Cregier*, 1 Barb. Ch. R., 498; *Green* v. *Putnam*, 1 id., [S. C.] 500; *Beardslee* v. *Beardslee*, 5 id., 324; *Weller* v. *Weller*, 28 id., 588; *Poor* v. *Horton*, 15 id., 485; *Durando* v. *Durando*, 23 N. Y., 331.)

PECKHAM, J. The statute declaratory of the common law enacts that a widow shall be endowed of all the lands whereof her husband was seized of an estate of inheritance at any time during the marriage. (1 R. S., 740, § 1.)

It is not necessary that the husband should have been seized of a fee simple absolute, to enable the wife to have dower. If he was seized of an estate in tail male, or of the heirs of his body, she shall have dower. (Lit, § 53, 40, *a*; Com. Dig., title Dower, A. 6.)

"Thus, generally, in every case where the issue which the husband may have by his wife by possibility may inherit, his wife shall be endowed." (Com. Dig., title Dower, A. 6; Park on Dow., 79; Perk., § 301; Lit., § 52.)

So, where the husband is seized of a base or conditional fee, or of a fee with a determinable quality attached to it, she has dower.

The dower will attach subject only, when the determinable quality arises from defect of title, to be defeated by the avoidance of the estate of the husband. (Park on Dow., 49; id., 37.)

So, if the husband have a defeasible estate in fee tail, his wife shall be endowed till his estate be defeated. (Com. Dig. Dower, A. 6, and cases cited.)

So, her dower terminates, if the conditional or base fee be ended, and the grantor enter for condition broken. (*Beardslee* v. *Beardslee*, 5 Barb., 324.)

"The seizin must be of an estate of inheritance, confer-

ring the right to the immediate freehold, as the result of one entire limitation, or several consolidated limitations." (Park, 47.)

Seizin of a vested remainder is not sufficient to give dower. So plain a point is decided in this court. (*Durando* v. *Durando*, 23 N. Y., 331.)

I see no objection to the merger of this life estate of John Jackson, the father, in the vested remainder of his son, the husband of Mary L. Jackson, under the decision of *Moore* v. *Littel*. (41 N. Y., 66.) This is a part of the same estate there adjudged. If the son should die in the lifetime of the father, I think the better opinion is that the estates divide again, and the widow is then not entitled to dower.

Moore v. *Littel* holds the estate of the son, prior to the death of the father, to be a vested remainder; the son was also seized in fact and in law of his father's life estate, and then became seized of the inheritance, subject to being defeated by his own death, prior to the decease of his father. In such case I think the wife has dower, subject to being defeated by the same means. The plaintiff claims that the sale of the son's life estate upon execution cut off his title.

It is a settled rule of the common law, laid down in the elementary books, that after dower has once attached, it cannot be extinguished or suspended by any act of the husband alone, in the nature of alienage or charge. (Park, 191).

The rule is adopted in much broader language in our statute. (1 R. S., 742, § 16.)

At common law there might have been an intermediate estate for years and yet the wife had dower—as estates for years were not highly regarded at common law. But *cessit executio* during the term. (Com. Dig. Dower, A. 6; Perk., § 336.)

So, if there be a mesne remainder for life, who surrenders his estate to the tenant for life (Id.), though the surrender be upon condition, for the estate is gone until the condition be broken. (Id.)

In this case there is no intervening estate. The husband is

Statement of case.

seized of the life estate in fact and in law, and he is also seized of a vested remainder as adjudged, subject to be defeated of the remainder by his death prior to that of his father.

This is such a seizin as prevents the alienation of the estate or its encumbrance, to the prejudice of the wife's dower. In other words, dower attaches to such an estate, subject to be defeated as above stated, and as the husband survived the father, her dower becomes absolute. The decree must be modified according to these views, with costs to her—no costs to either of the others, and the cause remitted for further proceedings.

All concur.

Judgment modified in accordance with opinion, and affirmed as modified.

NELSON McSTEA, Respondent, *v.* EDWARD MATTHEWS, impleaded etc., Appellant.

One who has been engaged in carrying on business in the name and ostensibly as a member of a firm, will not be permitted to urge against his own acts, in dealing with third persons, the non-existence of the firm by reason of a want of consent of one of the intended members, although by the articles of partnership such consent was necessary to its existence.

By the implied and express permission of the federal government, evidenced by the proclamations of the president at the outset of the war of the rebellion (Proclamations of April 15 and April 19, 1861), and by the act of congress of July 13, 1861, commercial intercourse between citizens of the insurrectionary States and of the loyal States was permitted and was lawful, until the issuing of the president's proclamation of August 16th, 1861, declaring such intercourse unlawful; a co-partnership therefore existing between citizens of the two sections was not terminated, by reason of the war, until that date.

(Argued May 27, 1872; decided November 12, 1872.)

APPEAL from the judgment of the General Term of the New York Common Pleas, affirming as modified, in case plaintiff stipulate to modify, a judgment in favor of plaintiff, entered upon a verdict.

Statement of case.

The action was brought against defendants as members of the firm of Brander, Chambliss & Co., upon three drafts drawn upon and accepted by that firm, one dated April 13, 1861, for $8,050.60, one dated February 26, 1862, for $1,169.99, and one dated February 26, 1862, for $107.97; also a note signed by the firm, dated January 2, 1862, for $864.25. The defendant Matthews resided in New York, the others in New Orleans.

An agreement was made in New Orleans, on the 27th March, 1861, before a notary public, for the formation of a copartnership *in commendam*, signed by Brander, Jr., Chambliss & Matthews.

It was provided in the agreement that James S. Brander, Sr., the father of James S. Brander, Jr., should be a special partner. Mr. Brander, Sr., was then absent from New Orleans, and in the Island of Nassau. The agreement concluded with these words: "And it is further agreed and understood that a copy of this act shall be immediately transmitted to said James S. Brander, Sr., for his approval; and that in case of his refusal, *the present* contract shall become null and void."

A copy of this article was received by Brander, Sr., at Nassau, and he refused to approve of it.

Matthews remained in New Orleans, taking an active part in the management of the business, until about April 27, 1861.

Upon the trial the court directed a verdict for the plaintiff upon all the causes of action. The General Term decided that the judgment be reversed, unless plaintiff should stipulate to reduce the judgment by deducting the amount of the last two acceptances, and the note and interest, and if he should so stipulate that it be affirmed. The plaintiff stipulated as required, and the judgment was affirmed as modified.

John Sherwood for the appellant. That the effect of the war of the rebellion was to dissolve copartnerships between citizens of the north and south, is now well settled. (*The*

Prize Cases, 2 Black, 635; *The William Bagaley*, 5 Wallace, 507; *Woods* v. *Wilder*, 43 N. Y., 164; *The Bank of New Orleans* v. *Matthews*, Ct. App. March, 1872; *Griswold* v. *Waddington*, 15 John., 57; 16 id., 438.) The war began April 13, 1861, the date of the attack upon Fort Sumter. A proclamation was not necessary to make it a legal war. (*Swinerton* v. *Col. Ins. Co.*, 37 N. Y.; *The Prize Cases*, 2 Black, 635; *In re Grossmayer*, 9 Wall., 74; *Hanger* v. *Abbott*, 6 id., 635; *The Protector*, 12 id., 700; *The Venice*, 2 id., 274; *Mrs. Alexander's Cotton*, 2 id., 404; *The Wm. Bagaley*, 5 id., 407; *Hanger* v. *Abbott*, 6 id., 535; *Allen* v. *Russel*, 12 Am. Law Reg., 361; *Billgery* v. *Branch*, 17 id., 334.) Defendant is not estopped from setting up the dissolution of the partnership, by his acts after April 13, 1861. (*Coppell* v. *Hall*, 7 Wall., 558.) To constitute an estoppel it must be affirmatively shown that defendant waived the objection. (*Lawson* v. *Brown*, 1 Selden, 394; *Irwin* v. *Concklin*, 36 Barb., 60, and cases; *Jewett* v. *Miller*, 10 N. Y., 402.) This action was commenced during the war by an enemy; he could not maintain an action. (*Sanderson* v. *Morgan*, 39 N. Y., 231.)

A. F. Smith for the respondent.

Church, Ch. J. The general question in the case is whether the defendant Matthews is liable as a member of the firm of Brander, Chambliss & Co., upon the acceptance by that firm on the 23d of April, 1861, of the draft of $8,050.06. The other claims for which the action was brought were properly excluded by the General Term. If not dissolved by the war of the rebellion, there can be no serious question of the existence of the firm at that time, and of the liability of the defendant as a member of it. The consent of the senior Brander to become a party to the articles of association as a partner *in commendam*, was not necessary to the liability of the other members to third persons dealing with them, while carrying on the business in the name of the firm. The

defendant Matthews was in New Orleans at the time the draft was accepted, engaged in superintending and managing the business in the name of the firm, and would not be permitted to urge against his own acts the non-existence of the firm, by reason of a want of consent on the part of one of its intended members, although such consent was, by the articles, necessary to the existence of the firm.

The important point involved in the case is, whether the partnership had at that time been dissolved by the existence of the war of the rebellion. This involves the question whether war existed at that time in the State of Louisiana against the government of the United States, so as to render unlawful all commercial intercourse between the citizens of that State and the citizens of other portions of the country. The court below placed its decision against the defendant upon the authority of the dissenting opinion of Nelson, J., in *The Prize Cases* (2 Black, 635), which maintained, in substance, that, under our Constitution and theory of goverment, the insurrection could not be treated as a war, with its legal consequences, until congress, the war-making power, had declared or recognized its existence, and this was not done until the passage of the act of congress on the 13th day of July, 1861. The majority of the court held that war did exist as early as the first capture, which was May 17th, 1861; that the firing upon Sumter, the ordinance of secession of various States, and hostile preparations on the part of the insurgents, together with the action of the president, representing the government in measures to meet these warlike demonstrations, evinced by his proclamation of April 15th, calling out the militia, and the proclamations of blockade of April 19th and 27th, were conclusive evidence that war existed, and that the rights and *status* of the citizens were affected by such war, and that the capture of a vessel owned by citizens of one of the insurgent States was lawful, upon the ground that such owners were public enemies. Without assuming to determine between the soundness of the views contained in the respective opinions, it appears to me proper that, upon a

question of this character, our decision should, if possible, harmonize with those of the federal courts, and we must therefore regard the authoritative decision of the court, rather than the dissenting opinion, even though, as an original question, we should concur with the latter. I cannot, therefore, adopt the grounds upon which the General Term placed its decision. In the late *Case of the Protector* (12 Wal., 700) the same court, in determining what space of time must be excepted from the statute of limitations in bringing an appeal by the war of the rebellion, held that such suspension commenced on the 19th day of April, 1861, the date of the first proclamation of intended bockade. Whilst these and other kindred cases do hold that war existed as early as the 23d of April, 1861, and that certain legal consequences resulted therefrom, they do not cover the precise question involved in this case; and that is, whether, at that date, all commercial intercourse was unlawful by reason of the existence of the war. It is conceded that, according to the law of nations and the common law, one of the consequences of war is the interdiction of all commercial intercourse between the subjects of the two countries, including the dissolution of all partnerships. (1 Kent's Com., 66; *Griswold* v. *Waddington*, 16 J. R., 438; *The William Bagaley*, 5 Wall., 377.)

The reason for this rule is too obvious to require comment. A state of war puts all the members of the two nations in hostility to each other, and pacific trading and intercourse are inconsistent with that condition; but a more important reason is that "It would counteract the operations of war, and throw obstacles in the way of the public efforts, and tend to disorder, imbecility and treason." (1 Kent's Com., 74.) It is equally well settled that this rule may be modified by the sovereign power. Trading may be permitted by any government engaged in war. Every country settles its own policy in this respect, and determines for itself whether it is most for its interest to allow commercial intercourse or not. (*United States* v. *Lane*, 8 Wall., 195.) The right of each

State to permit unrestricted commercial intercourse, or partial licensed trading in specific cases, is apparent upon general principles, and recognized in all the authorities. (1 Kent's Com., 74.) It is pertinent, therefore, to inquire whether such intercourse was permitted by the government; and if so, up to what period. *The Prize Cases* (*supra*) recognize the acts of the president, prior to the assembling of congress, as the acts of the government, having equal effect upon this question as if authorized by congress. The first proclamation bears date April 15, 1861; prior to which time several of the States had passed ordinances of secession, several of the forts and some public property had been seized, and Fort Sumter had been attacked. The proclamation, after reciting that the execution of the laws of the United States were obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, made a call for militia to the number of 75,000 men, and contains this clause: "I deem it proper to say that the first service assigned to the forces hereby called forth will probably be to repossess the forts, places and property which have been seized from the Union; and in every event the utmost care will be observed, consistently with the objects aforesaid, to avoid any devastation, *any destruction of or interference with property, or any disturbance with peaceful citizens in any part of the country.*" The terms of this proclamation repel the idea of prohibiting or restricting free business intercourse between citizens of different sections of the country. On the contrary, it pledges protection to property, and the lawful pursuits of peaceful citizens. It seeks only to repossess the property which had been seized, and put down the unlawful combination to resist the laws. The next is a proclamation of intended blockade, bearing date April 19, 1861. The president, in this proclamation, after reciting that an insurrection had broken out in several States, and that a combination of persons threatened to grant pretended letters of marque and reprisal, proceeds to say that, "With a view to the same purposes before mentioned, and to the protection of the public

peace, and the lives and property of quiet and orderly citizens pursuing their lawful avocations until congress shall have assembled and deliberated on the said unlawful proceedings, or until the same shall have ceased," he deems it advisable to set on foot a blockade of the ports of States in which the insurrection existed. Upon the authority of *The Prize Cases*, this was an act of war on the part of the government, and justifiable as a war measure, based upon the existence of a state of war. But so far as it operated as a restriction upon trade, it was confined to the commerce of the ports, and, ostensibly, in preventing the fitting out of vessels to cruise under pretended letters of marque and reprisal; and it expressly assumed to protect the lives and property of quiet and orderly citizens pursuing their lawful avocations "*until congress shall have assembled and deliberated.*"

Nothing is plainer to my mind than the intention, by this proclamation, to avoid any interference with the business relations of the citizens of the country, except so far as the blockade would have that effect until the meeting of congress. It seems incongruous to hold that a proclamation which expressly declares protection to citizens in their lawful avocations should have the legal effect of invalidating all business transactions. The next material act of the government bearing upon this question was the act of congress of July 13, 1861, the fifth section of which declares that, in a certain specified contingency, "it may and shall be lawful for the president, by proclamation, to declare that the inhabitants of such State, or any section or part thereof, where such insurrection exists, are in a state of insurrection against the United States; *and, thereupon*, all commercial intercourse between the same and the citizens of the rest of the United States shall cease and be unlawful so long as such hostility shall continue."

This was the first intimation, on the part of the government, of an intention to prohibit commercial intercourse, while, as we have seen, every previous expression repelled such intention. The fair construction of this act is to regard

it both as an admission of the lawfulness of commercial intercourse, up to that time, and a permission to continue it until the president should issue the proclamation.

It is urged that this act provided merely for a warning or notification to the people that war existed, so that they might know and protect their rights; but this view is inconsistent with the terms of the act. It authorizes an act to be done, the effect of which, if done, is declared to be to prohibit commercial intercourse from the time the act is done.

It does not purport to prohibit such intercourse, nor to declare a state of war, the legal consequence of which would be to prohibit it; but, in substance, it authorizes the president to prohibit it. The language of the act is utterly inconsistent with the claim that such intercourse was then or had been unlawful. In pursuance of this act the president, on the 16th day of August, 1861, issued his proclamation, declaring certain States in a state of insurrection, and that commercial intercourse with the citizens of other States was unlawful. From that period such intercourse became unlawful; and up to that period, by the implied and express permission of the government, it was lawful. If the war had ceased on the 15th day of August, 1861, and the proclamation of the 16th had never been issued, can there be a doubt that the ordinary business relations of the citizens of the respective sections of the Union would have been unaffected?

It may well be that the citizens of the insurrectionary States should be regarded as public enemies for the purpose of enforcing the blockade, and that, where the courts were interfered with so as practically to prevent an appeal, the running of the statute of limitations should be suspended, and that these should be regarded as consequences of an existing state of war; but they are not necessarily inconsistent with the continuance of ordinary business relations, and certainly not with the right of the government to permit such continuance. The language used by the government is capable of no other construction than an intention to permit business intercourse. Such must have been the general under-

standing of the people, and good faith demands that it be maintained. (*Woods* v. *Wilder*, 43 N. Y., 165.)

The long and sanguinary contest which followed may reflect light upon the nature and magnitude of the preparations which were then made or contemplated to resist the government, but cannot change the legal rights of citizens as they existed by the acts of the government at that time.

That the intention of the government was in accordance with the views above expressed is confirmed by a recurrence to the circumstances attending the breaking out of the rebellion; and these circumstances will also serve to illustrate a distinction which, I think, exists between an insurrection and a war with a foreign nation, as it respects the question under consideration.

There was great doubt, both in official circles and among the people, whether the insurrection would ever reach the magnitude of a war; and it was predicted by prominent officers of the government, looking probably to efforts of conciliation as well as effective force to terminate it, that it would terminate within a specified number of days.

Impressed with this belief or with doubts whether it might not be true, and hoping that it might, and considering the extensive intimate business relations existing between the citizens of the insurrectionary States and the citizens of other portions of the country, and the great injury which would be inflicted upon both classes by a sudden and unexpected interruption of those relations, the government was highly commendable in endeavoring to prevent such interruption until the safety and integrity of the country seemed to demand it. Whilst vigorously resisting the aggressions of the insurgents by the use of ordinary war measures, it wisely postponed, to the latest practicable day, one of the most serious consequences of a state of war, the unqualified interruption of commercial intercourse. The same legal consequences result from a civil as a foreign war. In either, the government has the right to modify and restrict these consequences; but as it respects business relations between citizens of the

same country, existing upon the breaking out of an insurrection, there is much stronger reason, on the part of the sovereign power, to preserve them than in case of a foreign war; because, if the insurrection is suppressed the government has an equal interest in the prosperity of the insurgents as in the loyal portion of its citizens, and an interruption of those relations are equally injurious to both. In cases of insurrection the government possesses both belligerent and sovereign rights, and can exercise both or either, partially or wholly. (100 Mass., 56.) In the late civil war the government hesitated to accept a state of war; and when it did, it preserved, as long as possible, the business interests of the people. This is manifest from the various proclamations of the president, and especially from the act of Congress of the 13th of July, 1861. It follows that, when this draft was accepted, commercial intercourse was lawful by the permission of the government, and that the defendant is liable thereon.

It may be questioned whether the defendant should not, as to this draft, be regarded as a citizen of New Orleans.

Although his legal residence was in New York, yet he had entered into this copartnership some time previously, and at that time was personally superintending the business. That was his business residence, and for aught that appears he then intended to remain. But it is unnecessary to decide this point.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

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John McCoun, Respondent, v. The New York Central and Hudson River Railroad Company, Appellant.

The provisions of the Code regulating the formal proceedings in an action do not, simply because they are statutory regulations, necessarily become of the substance of the remedy or substantial in their character. (Per Allen, J.; Church, Ch. J., Peckham, J., concurring.)

An order denying motion to set aside a summons and complaint upon the ground that the notice inserted in the summons is not under the right subdivision of section 129 of the Code, where the complaint was served with the summons, does not affect a substantial right, and is not appealable to this court. (Grover and Folger, JJ., dissenting.)

An action to recover a statute penalty is not an action upon a contract within the meaning of section 129 of the Code, and the summons in such an action should be in the form prescribed by the second subdivision of that section.

(Argued June 4, 1872; decided November 12, 1872.)

Appeal from an order of the General Term of the Supreme Court in the fourth judicial department, affirming an order of Special Term, denying a motion to set aside the summons and complaint upon the ground of irregularity. The action was brought to recover a penalty or forfeiture under the statute to prevent extortion by railroad companies. (Chap. 185, Laws of 1857.) The summons was in the form prescribed by subdivision 1 of the 129th section of the Code of Procedure. The summons and complaint were served together.

A. P. Laning for the appellant. An action to recover a penalty or forfeiture given by statute is not "an action arising upon contract" within the meaning of subdivision 1 of the 129th section of the Code. (Code, §§ 53, 69, 127, 128, 129; *Fisher* v. *N. Y. C. R. R.*, Alb. Law Jour., vol. 5, p. 58; *Cole* v. *Smith*, 4 J., 193; *Bigelow* v. *Johnson*, 13 J., 428.) Although plaintiff unites in the complaint a cause of action upon contract, and one, not the summons, must be under the second subdivision of section 129. (*Morton* v. *Cary*, 26 How., 469.) The irregularity in the process is not cured by the service of the complaint with the summons. (*Ridder et al.* v. *Whitlock*, 12 How. Pr. R., 208; *Tuttle* v. *Smith*, 14 id.,

395; *Voorheis* v. *Scofield*, 7 id., 51.) Although plaintiff is not misled if he is or may be prejudiced by the irregularity, the summons should be set aside. (*Field* v. *Stone*, 7 How., 12.) The irregularity does affect a substantial right. (*Dix* v. *Palmer*, 5 How., 233; *Southworth* v. *Curtis*, 6 How., 271.)

Thomas M. Webster for the respondent. The summons was in the proper form. (3 Wendell's Black., 160; 3 Stevens' Black., 535; 2 R. S., 5; *The People* v. *Bennett*, 5 Abb., 384; 6 Abb., 343; *The Bd. of Com'rs of Excise of Albany* v. *Clasen*, 17 How., 193; *Mason* v. *Hand*, 1 Lans., 66.) The error, if any, did not affect a substantial right, and should be disregarded. (Code, § 176; *Brown* v. *Eaton*, 37 How., 325; *Baxter* v. *Arnold*, 9 How., 445.)

Allen, J. The order in this and several hundred other actions now before us and depending upon the result of this appeal is not appealable. Only such orders arising upon any interlocutory proceedings, or upon any question of practice, are appealable, as affect a substantial right and do not involve any question of discretion. (Code, § 11, sub. 4.) A departure from the Code in any particular, in the progress of an action, does not necessarily affect a substantial right. A strict and literal compliance with a statutory regulation is not necessarily of the substance of the remedy, or substantial in its character. Whatever is a question of practice is of the same character, whether it arises under a positive statute, an express rule of the court, or the settled usages and law of procedure. Under either a substantial right may be affected, and the questions may be such as to exclude the exercise of any discretion, but these are exceptional cases. Most of the provisions of the Code are modal and intended for the regulation of the formal procedure in the action, and are no more sacred than any other rules of practice. The Code recognizes this: 1st. By directing that any defect or error in the pleadings or proceedings which do

not affect the substantial right of the adverse party, shall be disregarded in every stage of the action. (Code, § 176.) And, 2d. By giving the largest liberty to the court in its discretion, either before or after judgment, to amend any pleading, process or proceeding by correcting a mistake in any respect. (Code, § 173.) If a literal adherence to the Code, and its forms and requirements, had been deemed a substantive right and essential in every case, these two sections would not have been enacted. It is necessarily wholly immaterial, and cannot, in the nature of things, affect a substantial right of the defendant, whether a summons is under the first or second subdivision of section 129, when a copy of the complaint, as was in all the cases before us except six, is served with the summons. The office of the summons is to bring the defendant into court to give the court jurisdiction of the person. The process, and its particular form, are prescribed by sections 127 and 128 of the Code. Civil actions must be commenced by the service of summons, which shall be subscribed by an attorney and directed to the defendant, and shall require him to answer the complaint within twenty days after the service of the summons. This is the effective process to subject the defendant to the jurisdiction of the court. The subsequent section (129) directs the insertion of a notice in the summons, in actions on contract for the recovery of money only, that judgment will be taken for a specified sum on failure of the defendant to answer, and in other actions, that application will be made to the court for the relief demanded. The statute permits the commencement of an action by the service of a summons without a complaint. (Code, § 130.) The purpose of the notice required by section 129 is to inform the defendant of the character of the action and the consequences of a default, that he may understandingly determine whether the protection and preservation of his rights call for an appearance and answer. But if the complaint is served with the summons, the defendant has more full and perfect knowledge of the cause of action and the consequences of a default than he

could get from the summons alone, and if there is an error or defect in the summons, it carries with it the remedy and correction, and an effectual preventive against error by any one. The objection is, that the notice is that the plaintiff will take judgment for a specified sum instead of notice of an application to the court for the relief demanded, or *vice versa*. It would be trifling with the rights of suitors, sacrificing substance to the merest form, to hold that the denial of a motion to set aside the summons and complaint under such circumstances affected a substantial right of the defendant, and that he was or could be prejudiced by the particular form of the notice. Upon the merits, so far as it can be said to have merits, the motion was frivolous. The service of the summons with the notice in the form challenged, if no proceedings could regularly be taken under it, could affect no one. Conceding that the summons and notice were a nullity until some action was taken, they injured no one. *Non constat* that the plaintiff would ever take any proceedings or undertake to obtain a judgment upon the service. A mere notice cannot be set aside. A defect like this is no cause for setting aside the summons. The defendant must wait till some action or proceeding is had under it. (Mac Namara on Nullities, 182 and 183, and cases cited.) But for the reasons first assigned, I am for a dismissal of the appeals.

The question whether a party in court, by the regular service of a summons, irregular it may be in form, shall litigate in that suit or upon the service of another summons, slightly different in form, when he has not been misled and does not lose the benefit of any defence he may have had, and when the defenses in the two actions must be precisely the same, does not affect any substantial right. (*Barder* v. *Covill*, 4 Cow., 60.) Upon the question actually decided by the court below, I am of the opinion that that court erred in holding the summons to have been regularly issued under the first subdivision of section 129 of the Code. The actions within that subdivision must "arise on contract and be for the recovery of money only." This action is for the recovery

of money only, and in that respect is within the provisions of the subdivision, but is not upon contract. That term was used in its ordinary and proper sense. A contract is a drawing together of minds until they meet and an agreement is made to do or not to do some particular thing. It may be express, or it may be implied or inferred from circumstances, and this implication is but the result of the ordinary and universal experience of mankind. If A. borrows money of B., the courts may imply a promise to repay the money, for the universal experience is that in such a case a promise is exacted and made. An implied promise or contract is but an express promise, proved by circumstantial evidence. It is quite distinct from that fiction by which a statute liability has been deemed sufficient to sustain an action of assumpsit, upon the ground that a party subjecting himself to the penalty or other liability imposed by statute has promised to pay it. That feature does not suppose a contract, but simply a promise *ex parte*. In this view, every man promises not to trespass on his neighbor's property, or to commit an assault upon his person, and an action of assumpsit might be brought and summons issued under the first subdivision of section 129, for a breach of this implied contract to observe the laws. The Code was not dealing with a legal fiction in prescribing a form of summons in actions arising on contract. A statute liability wants all the elements of a contract, consideration and mutuality, as well as the assent of the party. Even a judgment founded upon contract is no contract for *judicium redditur in invitum*. (*Bidleson* v. *Whytel*, 3 Bur., 1545; *Wyman* v. *Mitchell*, 1 Cow., 316.) The plaintiff doubtless erred in making his summons as in an action upon contract, but as the mistake was cured by serving with it a copy of the complaint, the order of the court below should be affirmed, if the appeal is not dismissed. I am for a dismissal of the appeal. Such a disposal of this appeal disposes of over five hundred appeals by this defendant from orders made refusing applications to set aside the summons and complaint, because the notice inserted in the summons was not under the right

subdivision of section 129, the plaintiffs being different, but the attorneys, in many of the cases, the same.

But one bill of costs should have been allowed by the court below in granting or refusing the motions made at the same time upon the same or similar papers, and which might have been made on one set of papers, entitled in the different actions, and where the attorneys were the same. (*Jackson* v. *Keller*, 18 J. R., 310; *Same* v. *Garnsey*, 3 Cow., 385; *Jerome* v. *Boeram*, 1 W. R., 293; *Schermerhorn* v. *Noble*, 1 Den., 682; *Post* v. *Jenkins*, 2 How. Pr. R., 33; *Cortland Co. Mut. Ins. Co.* v. *Lathrop*, id., 146.) The appeal should be dismissed, with costs, upon the principle settled by these cases.

Peckham, J. Should the summons in this case have been issued under the first or second subdivision of section 129 of the Code? The first provides for "an action arising on contract, for the recovery of money only;" the second for "other actions." Is this "an action arising on contract?" It is an action for a penalty for violating a statute. It is claimed to arise on contract, upon the principle stated in 3 Black. Com., 161, whereby a forfeiture imposed by the by-laws of a corporation upon any that belong to the body, immediately creates a debt, for which an action of debt will lie by the party injured. This principle is declared by Blackstone to be "an implied, original contract to submit to the rule of the community whereof we are members." He then adds that the same reason may, with equal justice, be applied to all penal statutes.

This principle, if carried out by the same reasoning, would abolish all actions of tort. The implied original contract to obey all statutes, by the same principle and the same reasoning, extends to all laws, whether statutory or common law. It is surely not confined to the obeying of all statute law simply. Thus assumpsit, if not debt, would lie for an assault and battery, or for arson, etc.

I incline to think that this provision of the Code had no

reference to this fiction of the law of an implied original contract to obey the laws of the land by each member of the community. But it meant what it plainly says.

In section fifty-three of the Code "an action for a penalty" is stated as impliedly different from an action on contract for the payment of money, and a justice of the peace is expressly given jurisdiction of both. The Code thus recognizes the difference between actions upon contract and an action for a penalty.

It is not enough that the recovery is to be for "money only," but the action must arise on contract also, to bring the case under the first subdivision.

I think it plain that this action does not arise on contract.

Is this order appealable?

To be appealable, it must be "an order affecting a substantial right, not involving any question of discretion." (Sub. 4, § 11 of Code.)

It seems to me that the opinion of the Supreme Court is right, that this order is not appealable.

It is difficult to perceive the "substantial right" involved in this order.

The defendant made the motion and brings the appeal. What benefit to the company, if this summons had been under the second instead of under the first subdivision? If the complaint were sworn to and it is an action on contract for the payment of money only, under the first subdivision the plaintiff may take judgment before the clerk without proof for the amount claimed in the summons. If not sworn to, the clerk takes proof of the claim, except upon instruments for the payment of money only, upon such instruments; he assesses the amount due upon its simple production before him. (Code, § 246, as amended in 1858.)

If the summons erroneously issued under the first subdivision compelled the assessment by the clerk instead of the judge, it might be urged, at least with plausibility, that the defendant was deprived of a substantial right—that he had a right to a judge instead of a clerk to adjudge his rights. But

it will be observed that the summons has no control as to the officer before whom the judgment shall be taken, whether clerk or judge. The Code declares that the clerk shall assess only in actions arising on contract for the payment of money only; not that he shall assess in cases where the summons has issued under the first subdivision—if erroneously so issued. So that the statement in the summons has no effect as to the officer before whom the assessment is to be made. It is no evidence of the nature of the action. The clerk would have no right to assess damages upon default in an action for an assault and battery, though it was commenced by summons, under the first subdivision.

So that if the defendant suffer a default upon this summons, he loses nothing. If he appear and take issue the case is tried before another tribunal.

The only effect the summons can possibly have, when issued under the first subdivision, is to limit the amount of recovery to the sum claimed therein in case of defendant's non-appearance; certainly he could take no more than that sum if his complaint be sworn to. (§ 246.)

This, so far as it goes, is a benefit to defendant, viz.: that he may rely that the plaintiff will take judgment only for a specified sum if defendant does not appear.

I do not perceive that the defendant can sustain any injury by this mistake. If he cannot, I do not think the order involves a substantial right.

The chief purpose of this summons is to get the defendant into court. Where the complaint is served at the same time, showing the cause of action and the amount claimed, the summons would seem to be of not the least value, though its formal issue may be required.

In my opinion, no substantial right is involved in this order—no possible loss can be sustained by the defendant by its issue under the first instead of the second subdivision.

Beside, the court had power to amend it, if there were any reason for so doing, and was bound to disregard it by the Code.

Statement of case.

The only benefit of this provision as to the different kinds of summons seems to be to enable parties to litigate the question by motions sometimes extremely difficult to determine, whether the summons is not under the wrong subdivision. It does not touch the merits or progress of the action in any way. It is a harmless contest, as it can injure no one. It no more involved a substantial right than would the question whether the summons was written in red or in black ink. That inquiry is just as substantial to the rights of the parties. Did the legislature ever intend that an appellate court should consider such questions?

The appeal should be dismissed.

For dismissal of appeal CHURCH, Ch. J., ALLEN, PECKHAM and RAPALLO, JJ.

RAPALLO, J., concurs upon authority of section 176 of Code.)

Against dismissal, GROVER and FOLGER, JJ.

Appeal dismissed.

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ELIZABETH BRINKLEY, Respondent, *v.* HUGH L. BRINKLEY, Appellant.

Although the ecclesiastical law of England is no part of the common law thereof adopted in this State, yet where, by our statutes, any part of the jurisdiction exercised by the ecclesiastical courts of that country was given to our courts, the settled principles and practice of those courts became a precedent and a guide; and the grant of that jurisdiction carried with it, by implication, the incidental powers indispensable to its proper exercise, and not in conflict with our own statutory regulations.

Alimony and allowance for expenses will not be allowed in an action for divorce brought by one claiming to be a wife, where marriage, in fact, is denied by the answer, until the actual existence of the marital relation is proved to the satisfaction of the court, or is admitted. The court, however, is not limited to the allegations of the complaint and the denials of the answer. If other legitimate proofs are submitted which make out, in the judgment of the court, a fair presumption of the fact of marriage, it has power to make the allowances. (PECKHAM, J., dissenting.)

For the purposes of temporary alimony it is not necessary that the fact of marriage be so conclusively established as will be required for perma-

Statement of case.

nent alimony or other ultimate purposes of the action. If the putative wife make out a reasonably plain case of the existence of the marital relation, she should be furnished with the means of temporary support and of conducting the suit until the truth or falsity of her allegations can be ascertained by the proofs formally taken in the case. (PECKHAM, J., dissenting.)

Where, therefore, upon an application for temporary alimony and an allowance for expenses, the facts undisputed are such as that from them a presumption arises that the parties were married, so that the affirmative rests upon defendant to repel that presumption, the court has jurisdiction and power to grant the application, although marriage, in fact, is denied; and the opposing papers show facts irreconcilable with the existence thereof, or of matrimonial cohabitation. (PECKHAM, J., dissenting.)

A denial in the answer of the allegation of the complaint that the plaintiff was, at the time of exhibiting her complaint, an actual resident of this State, does not take from the court the power to make such allowances, nor does an allegation of the answer that, before the bringing of the action, plaintiff had brought another action for the same cause against defendant in a court of another State. These are issues in the cause, and the fact of marriage being established the court has power to take from the means of the defendant to enable plaintiff to establish her allegations. (The authorities, upon the subject of temporary alimony and allowances for expenses, collated and discussed.)

A judgment of a court of another State is only conclusive upon the parties where it is a definitive judgment upon the same cause of action upon the merits. An interlocutory order upon a special application pending the suit, is not conclusive upon a similar application in an action in this State.

(Argued June 18, 1872; decided November 12, 1872.)

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, affirming an order made at Special Term, granting alimony to plaintiff during the pendency of the action and an allowance for expenses.

The action was brought to obtain a limited divorce, with suitable maintenance, on the ground of abandonment by the defendant, and his neglect and refusal to furnish her support.

The complaint alleges that the plaintiff, at the time of the commencement of the action, was an actual resident of the city of New York; that the parties were married on or about the 14th of June, 1864, at that city; that on or about the 22d of March, 1869, at Memphis, Tennessee, the defendant

abandoned the plaintiff, and has ever since neglected and refused to provide for her.

The answer consists of a general denial, and an allegation that plaintiff is a resident of Memphis, Tennessee, and that there is pending, in the chancery court of Memphis, an action between these parties for the same cause. In addition to the pleadings, affidavits and other papers were read in support of and in opposition to the motion.

The facts presented upon the motion appear sufficiently in the opinion.

Wm. Henry Anthon for the appellant. No contract of marriage is proved by the evidence in this case. (*Cunningham* v. *Cunningham*, 2 Dow P. C., 482; *Clayton* v. *Wardell*, 4 Comst., 430; *Cunningham* v. *Burdell*, 4 Bradf., 482.) Plaintiff was not a resident of this State when she commenced this action, and an action for divorce, being a local action, must be brought where the plaintiff is domiciled. (*Somerville* v. *Lord Somerville*, 5 Vesey, 787; *Matter of Fitzgerald*, 2 Caines, 317; *Rosevelt* v. *Kellogg*, 20 J. R., 210; *Boardman* v. *House*, 18 Wend., 512; *Frost* v. *Brisbin*, 19 id., 14; *Chaine* v. *Wilson*, 8 Abb., 78, 1 Bosw., 673; *Fisk* v. *Chicago & R. I. R. R. Co.*, 53 Barb., 472.) The pendency of an action for divorce in another State is a bar to an action for the same cause in this State. (*Brent* v. *Armfield*, 4 Cr. C. C., 577.) The question of alimony is *res adjudicata*. The definitive judgment of a foreign court is conclusive between the same parties on the same subject-matter. (*Walsh* v. *Darkin*, 12 Johns. R., 101; *Bowne & Seymour* v. *Jay*, 9 id., 221; *Taylor* v. *Bryden*, 8 id., 175; *Monroe* v. *Douglas*, 4 Sandf. Ch., 126; *Lozier* v. *Westcott*, 26 N. Y., 146.)

Miles Beach for the respondent. An order granting alimony *pendente lite* is not appealable; it rests in the discretion of the court. (*Jones* v. *Jones*, 2 Barb. Ch., 146; *Abbey* v. *Abbey*, 6 How., 340; *Moncrief* v. *Moncrief*, 10 Abb., 315; *Griffen* v. *Griffen*, 23 How., 189.) Unless an errone-

ous exercise of this discretion is shown, the court will not disturb the order. (*Leslie* v. *Leslie*, 6 Abb. [N. S.], 193; *People* v. *N. Y. C. R. R. Co.*, 29 N. Y., 422; *Downing* v. *Marshall*, 37 N. Y., 394.) Plaintiff was an actual resident of this State when the action was commenced. (2 R. S. [Edm. ed.], 154; *Vance* v. *Vance*, 25 How. Pr., 495, 576; *Bartlett* v. *City of N. Y.*, 5 Sandf., 44; *Matter of Hawley*, 1 Daly, 531; *Chaine* v. *Wilson*, 8 Abb., 78.) The pendency of the action between the same parties in Memphis was no bar to the action here. (*Kelsey* v. *Ward*, 16 Abb., 98; *People* v. *Northern R. R. Co.*, 53 Barb., 98; *Monroe* v. *Douglas*, 1 Seld., 447, 452; *Ahrenfeldt* v. *Ahrenfeldt*, 1 Hoff. Ch., 50; *Ward* v. *Ward*, 5 Abb., [N. S.], 145; *Casey* v. *Casey*, 2 Barb., 59; *Pomeroy* v. *Pomeroy*, 1 Johns. Ch., 606; *Johnson* v. *Johnson*, 6 id., 163; *Smith* v. *Smith*, 4 Paige, 92; *McIntosh* v. *McIntosh*, 12 How. Pr., 289; *Hoffman* v. *Hoffman*, 35 id., 384; *Griffin* v. *Griffin*, 23 id., 183; *Henry* v. *Henry*, 17 Abb., 411; *Bowne & Seymour* v. *Jay*, 9 Johns., 221; *Walsh* v. *Darkin*, 11 id., 99; *Mitchell* v. *Bunch*, 2 Paige, 620; *Burrows* v. *Miller*, 5 How. Pr., 51; *Cook* v. *Litchfield*, 5 Sandf., 342; *Hecker* v. *Mitchell*, 5 Abb., 453; *Williams* v. *Ayrault*, 31 Barb., 364; *Lorillard Fire Insurance Company* v. *Meshural*, 7 Robt., 314; Story's Conflict of Laws, § 610.) It was proper to read on the argument the exemplified copy of the order of discontinuance of the action in Tennessee. (*Duncan* v. *Duboys*, 3 Johns. Cases, 125; *High* v. *Wilson*, 2 Johns. R., 46; *Burt* v. *Place*, 4 Wend., 501; *Armstrong* v. *Percy*, 5 id., 535; *Ritchie* v. *Putnam*, 13 id.; *Williams* v. *Wood*, 14 id., 126; *Dresser* v. *Brooks*, 3 Barb., 429; *Bank of Charleston* v. *Emeric*, 2 Sandf., 718; *Onderdonk* v. *Voorhies*, 2 Robt., 623; *Robert* v. *Good*, 36 N. Y., 408.) Plaintiff made out a *prima facie* case of marriage and abandonment. (2 R. S. [Edm. ed.], 144; 2 Kent's Com., 87; Bishop on M. and D., §§ 78, 162; *Fenton* v. *Reed*, 4 Johns., 52; *Clayton* v. *Wardell*, 4 N. Y., 230; *Ferrie* v. *Pub. Admr.*, 3 Bradf., 151; *Tummalty* v. *Tummalty*, 3 id., 369; *Grotgen* v. *Grotgen*, 3 id., 373; *Cunningham* v. *Bur-*

dell, 3 id., 343; *Rose* v. *Clark*, 8 Paige, 574; *Matter of Taylor*, 9 id., 611; *Cheney* v. *Arnold*, 15 N. Y., 345; *Hayes* v. *People*, 25 id., 390; *O'Gara* v. *Eisenlohr*, 38 id., 298; *Bissell* v. *Bissell*, 7 Abb. [N. S.,] 16; *Van Tuyl* v. *Van Tuyl*, 8 id., 5.) Plaintiff was not bound to prove her case on the application for alimony. *Snyder* v. *Snyder*, 3 Barb., 624; *Smith* v. *Smith*, 1 Eds. Ch., 255; *Herforth* v. *Herforth*, 2 Abb. [N. S.], 489.)

FOLGER, J. This case was before the court formerly on appeal from an order adjudging the defendant in contempt for not rendering obedience to the order awarding to the plaintiff alimony *pendente lite*, and money for the expenses of the suit from the property of the defendant. (See 47 N. Y., 40.) We then held that for the purposes of that appeal we must assume that the court below had power to make the order and had well used it. The appeal now is from the order itself, by which alimony and expenses were granted, and the power of the Special Term to make that order is directly in question.

This is an action for a divorce, *a mensa et thoro*, on the ground of the abandonment of the plaintiff by the defendant, and of his neglect and refusal to provide for her. The complaint alleges that the plaintiff and defendant intermarried in 1864, and that the plaintiff is now the wife of the defendant. This allegation of the complaint is denied by the answer, and upon the pleadings the fact is at issue whether the parties to the action are or ever were husband and wife.

If the disposition of the questions raised by this appeal depended alone upon the pleadings in the case, it might be easily made. The allegations of the pleadings are direct, but most general in their character. There are in the case, however, a petition by the plaintiff and affidavits and other proofs in the nature of affidavits from both parties, which treat of the relations between them with much particularity, and

which are of importance in the determination of the points involved.

The order of the Special Term, brought under review, granted to the plaintiff a weekly allowance for her support and maintenance, to be paid by the defendant until the final determination of the action, and a sum in gross for her expenses in conducting the action.

It is proper for us to say here that we wish to be understood as expressing no opinion upon the merits of the main controversy or of what should be its final determination. We design to speak only of the power of the Special Term, with the facts before it, as they were presented in the papers, to grant the order appealed from.

The defendant contends that the Special Term had no power to grant this order, and he puts this claim upon the ground that the existence of the marital relation is denied, and its non-existence shown by the statements of the plaintiff herself, and that in such case alimony will not be granted *pendente lite.*

Some of the text books say that as the right to alimony can only result from the marital relation, a fact of marriage between the parties must be admitted or proven before there can be a decree for alimony *pendente lite.* (Bishop on Mar. and Div., § 570; Roper on Husb. and Wife, p. *310, note *k.*) And the ecclesiastical courts in England sometimes state the rule as broadly as that. In *Durant* v. *Durant* (1 Addams, 114; 2 Eng. Ecc. R., 43) it is said, "a general negative issue is then given to the libel, not even confessing the marriage, so that the court with no *constat* before it of a fact of marriage could allot the wife nothing on account or in the nature of alimony."

And in *Smyth* v. *Smyth* (2 Addams, 254; 2 Eng. Eccl. R., 293) it is declared that it is incompetent for the court under any circumstances to make a formal allotment to the wife of any sum in the nature even, or as on account of alimony, until a fact of marriage at least is proved against or admitted by the husband. It is to be observed, however, that in the last case, after this

strong statement of the rule, the court practically ignored it by recommending an allowance by way of alimony proportionate to the means of the husband, with an intimation that if its recommendation was not complied with it would take it into account when alimony in the progress of the cause came to be regularly allotted.

There is, however, a qualification annexed to this rule by other decisions. In *Bird* v. *Bird* (1 Lee, 209; 5 Eng. Ecc. R., 366), the husband brought suit to set aside his marriage as a nullity, by reason that, at the time of contracting it, there was living a husband of the wife by a former marriage. It was admitted on the part of the husband that there had been an actual ceremony of marriage in due form, followed by cohabitation and the birth of several children. The former marriage was not denied by the wife, and the issue in the case was whether the former husband was living at the date of the second marriage. In *Smith* v. *Smith*, cited in *Earl of Portsmouth* v. *Countess of Portsmouth* (3 Addams, 63; 2 Eng. Ecc. R., 428), and in the main case also, there had been a marriage in fact and in form, and an action was brought by the committee of the plaintiff to set aside the marriage as a nullity, in that the plaintiff was a lunatic, incapable of the contract of marriage and was the subject of the fraud of the wife. In these three cases the application of the putative wife was granted for money from the means of the husband to carry on the suit, and in two of them her right to temporary alimony is also asserted. And though it has been held that the ecclesiastical law of England is not a part of the common law of that country, and is no part of the common law thereof adopted in this State (*Burtis* v. *Burtis*, Hopk., 557), yet, when by our statutes any part of the jurisdiction exercised by those courts was given to our courts, the settled principles and practice of those courts became a precedent and a guide for our courts. (*Le Barron* v. *Le Barron*, 2 Am. Law. Rev., 212; S. C., 35 Vt., 365; *Griffin* v. *Griffin*, 47 N. Y., 134.) In *North* v. *North* (1 Barb., Ch. R., 241), the bill was filed by the husband to

annul the marriage on the same ground as that alleged in *Bird* v. *Bird* (*supra*). The defendant applied for alimony upon her affidavit, denying that the former husband was living at the time of the second marriage. It was held that for the purposes of the application the fact of marriage was admitted, and that the presumption was, that it was legal until the contrary should be established by the proofs in the cause. The chancellor there states, that the granting of an allowance for *ad interim* alimony and expenses of suit is not confined to cases in which both parties admit the alleged marriage to have been legal.

Now, in these cases from the English courts, and our court of chancery, it is apparent that if the allegations of the husband were true, the marriage was null and void, and there had not been in the inception a valid marriage between the parties, yet alimony *pendente lite*, and money for the expenses of the suit, were awarded to the wife. It was done upon the ground of a marriage *de facto* being admitted. And the issue being upon certain facts, dependent upon the truth of which it was whether there was or was not a marriage *de jure*, the ability should be given to the wife to maintain her negative of the allegation of those facts. They are, then, authorities to this extent, that where it appears to the court from the express admissions of the parties, or from the allegations of one not denied by the other, that there has been the form of a marriage between them, and the question at issue is whether the facts and circumstances of the case will show it not a marriage *de jure*, temporary alimony and money for the expenses of the suit will be awarded for the putative wife from the means of the alleged husband, although he denies the existence of the marital relation.

There is one case in the late Court of Chancery which goes farther than this. In *Smith* v. *Smith* (1 Edw., 255), a bill was filed by the wife against the husband for a divorce *a mensa et thoro*, on the ground of cruelty. It distinctly set forth the time and place of marriage, and the name of the minister who officiated thereat. It is to be inferred also that

it alleged "cohabitation and living together" as husband and wife. The bill was sworn to. The defendant put in a sworn plea, without answer, explicitly denying ever having been married to the complainant. On an application by the complainant for temporary alimony and money to carry on her suit, it was granted by the vice-chancellor. The court cited *Smyth* v. *Smyth* (*supra*), as a cause where temporary alimony was granted in effect, though not in form, and holds the defendant's plea insufficient to prevent the granting of the application. The report of the case is short, and reasons for the judgment are not given *in extenso*. Notice is taken that the defendant did not deny cohabitation nor living together with the complainant. This circumstance standing admitted was deemed worthy of consideration, as in truth it is. For a marriage in fact may be presumed from continued matrimonial cohabitation, the acknowledgment by the parties that they are husband and wife, the recognition by each other as such, and general reputation thereof. (*Rose* v. *Clark*, 8 Paige, 574; *In re Taylor*, 9 id., 611; *O'Gara* v. *Eisenlohr*, 38 N. Y., 296.) And in *North* v. *North* (*supra*), the chancellor presents such a presumption as one of the considerations moving him to his judgment. There are certain needed and salutary limitations and restrictive safeguards which the courts have attached to this rule, which will be noticed further on.

As the defendant in *Smith* v. *Smith* (1 Edw., *supra*) did not deny the facts from which an actual marriage might be inferred, though he did deny a marriage with form and ceremony, might not the court well hold that for the purposes of the application for temporary alimony and expenses of the suit there was *prima facie* the existence of the marital relation, though not formal in its inception?

Thus viewing the case of *Smith* v. *Smith*, it harmonizes with *North* v. *North* and the cases from the English ecclesiastical courts. If it is not to be thus viewed, it is a direct decision that a denial of the marriage relation by the husband is not ground for refusing an application by the putative wife

for alimony. And in *Vreeland* v. *Vreeland* (3 Green [N. J.] Eq. Rep., 43), where alimony was refused, the fact of marriage being denied in a sworn answer, it is intimated that if there had been proof of the defendant's cohabitation with the complainant as his wife, or his public acknowledgment of her as such, alimony could have been allowed.

At all events, the authorities cited are ample to sustain this proposition: that where there has been a marriage in fact, though its commencement was not according to the decent and recognized forms and ceremonies usual in society, and which, though not indispensable for its validity, are yet sanctioned by law; in an action by the wife for divorce or by the husband for a decree that the marriage is null, in which the putative wife avers the existence and legality of the marriage, though the alleged husband denies it; the court may, in its discretion, allow to the putative wife temporary alimony and money to carry on the action from the means of the alleged husband.

And the principle at the bottom is this: Where marriage in fact being denied, the affirmative is upon the party claiming to be the wife to show that an actual marital relation ever existed; there alimony will be denied until that fact is proven to the satisfaction of the court, or is admitted; for it is upon the existence of that relation alone that the right to alimony depends. Where an actual marital relation has been admitted or shown, and its existence in law is sought to be avoided by some fact set up by the husband, and it devolves upon him to show that fact; there alimony will be granted until that fact is shown; for the relation actually exists upon which the right to alimony depends, and the object of the litigation is to annul that actual relation by showing some other fact, the existence of which is denied. It may be said, too, that for the purposes of an application for temporary alimony there will not need that the fact of marriage be so conclusively established as for the purpose of permanent alimony, or any other ultimate purpose of the action. It is for the interest of society and in aid of public policy that where

the married relation has been in fact assumed, it should not easily and capriciously be laid aside; and where it is averred by the putative wife and denied by the alleged husband, if she makes a reasonably plain case of its existence, she should be furnished with means of temporary support and of conducting the suit until the truth or falsehood of her allegations can be ascertained by the proofs formally taken in the case. (See *North* v. *North*, *supra*, p. 244; *Purcell* v. *Purcell*, 4 Hen. & Munf., 507; *Herforth* v. *Herforth*, 2 Abb. Pr. R. [N. S.], 483.) So far have the courts carried this idea that even after the verdict of a jury upon a feigned issue, finding the wife guilty of adultery, arrears of alimony accruing after verdict and up to date of decree were ordered to be paid. (*Stanford* v. *Stanford*, 1 Edwards, 317.) And further it may be said, that any facts and circumstances being shown which are sufficient for a court to presume therefrom an actual marriage, they are also sufficient for a court thereon to found an order granting temporary alimony, though other allegations which are at issue, once being established, would repel such a presumption.

Hence in an application for temporary alimony and the expenses of the action, although there may be in the answer a general denial of the existence at any time of the marital relation, the court has the power from the affidavits and other papers presented to it to pass upon the question for the purposes of the application, and it is not bound down to the allegation of the complaint and the denial of the answer if other papers or proofs are submitted to it; and though the denial of the answer, if standing alone, would bring the case within the rule that where no marital relation is admitted or proven there is no right to alimony; yet if the matters contained in other papers or shown by legitimate proofs before the court make out in the judgment of the court a fair presumption of a fact of marriage, it has the power to grant alimony pending the action and expenses of the action.

It remains to be seen whether the facts admitted or shown

beyond dispute, in the petition and affidavits in this case, are such as to meet these requirements.

The complaint and the answer are destructive of each other, for the allegations of one are neutralized by the denials of the other.

The petition of the plaintiff alleges a marriage contract in New York city between the parties, without witness or ceremony, or solemnization with any civil or religious rites, but a simple contract of the parties *per verba de presenti*, followed by actual consummation, cohabitation as husband and wife, and recognition and acknowledgment of each other as such to mutual acquaintances and friends.

The deposition or affidavit of the defendant denies the contract of marriage, and the cohabitation together as husband and wife, and "that, at any time or place, he, by word or act, gave the least foundation for the supposition or charge that the plaintiff became his wife, or that, in any manner, shape or form, he was ever married to the plaintiff, in New York or elsewhere."

The petition sets out the particulars of the alleged contract. It also sets out the particulars of the time and place of the recognition and acknowledgment of each other as husband and wife, and specifically designates the places and times at which, and the persons to whom the defendant introduced the plaintiff as his wife, and acknowledged her as such, and alleges the general reputation which existed of their matrimonial connection. The petition is unsupported in its statement that there was a marriage contract between the parties, but is corroborated by numerous explicit and reliable affidavits in its other statements above noticed.

The deposition of the defendant does not, nor does any sworn statements of the defendant deny, in particular averments of denial, that he did at the times and places, and to the persons named in the petition and in the corroborating affidavits, introduce and acknowledge the plaintiff as his wife, or that they passed before many of their acquaintances at public hotels and boarding-houses as such, or that they

cohabited together ostensibly as husband and wife, or that such was the reputation of the relation existing between them.

It would be tedious to go into a minute recapitulation of the statements made to this effect in these affidavits. One of them may be noticed, which is perhaps the strongest and most specific of all; that of Alexander B. Mott, known as a highly respectable physician practicing in New York city, who says therein that he was called professionally to the plaintiff, and found her in bed; that the defendant was present in her room, together with the mistress of the boarding-house; that then and uniformly on subsequent occasions the defendant spoke of plaintiff as his (the defendant's) wife; that he (Mott) addressed them as Mr. and Mrs. Brinkley; that defendant on another occasion consulted him (Mott) professionally, and then stated that the plaintiff was his (the defendant's) wife, but that for family reasons it was not thought proper to announce it. These particular statements are not denied by the defendant.

The defendant, on his side, produces the affidavits of persons who make strong representations with much minuteness of the declarations of the plaintiff, and her conduct in accordance therewith, irreconcilable with the existence of the fact of marriage between the parties, or of matrimonial cohabitation, and consistent with the allegation of the defendant, that the relation between the parties was commenced and continued for meretricious purposes. There are also letters from the plaintiff, as is alleged, which, read in the light of these affidavits, are condemnatory of her.

These papers, affidavits and proofs are mainly of two classes, viz.: Those which are brought before the court by the plaintiff have been served upon the defendant and brought to his knowledge, and he has had opportunity to answer them as specifically as he saw fit; those which are brought before the court by the defendant, except the answer in this action, and the answer in the action in the court of Tennessee, do not appear to have been served upon the plaintiff or to have

come to her knowledge until read on the motion, nor does it appear that she has had opportunity to answer or deny the details contained in them. The general purport of them, that she was of unchaste character and person, and that her relation with the defendant was libidinous and unsanctioned by law, she has in effect anticipated in her petition, and negatived. (See *Wood* v. *Wood*, 2 Paige, 108, 114.)

It was, then, the effect of all these papers that it was admitted by the defendant, before the Special Term, that these parties did cohabit and live and lie together, justifying, in the eyes of acquaintance and of reputable moral people, that mode of life, in that there was a matrimonial relation existing between them; that they did acknowledge that they were husband and wife, and did recognize and introduce each other as such; that they were received as such by reputable acquaintances and friends, and that such was their common reputation.

From these facts, admitted or proven, the court might presume an actual valid marriage. The language of one authority is, that it was *competent to prove* the marriage by the exhibition of such facts. (*O'Gara* v. *Eisenlohr*, *supra*.)

The learned counsel for the defendant, with a commendable earnestness, urged upon the court not to sanction, by their judgment in favor of the plaintiff, the notion which he, perhaps correctly, averred was too prevalent; that in the State of New York, as no form, nor ceremony, nor civil nor religious rite was essential to the validity of a marriage, so any cohabitation of man and woman, no matter how or with what motive begun, might, by the false assumption of the marital relation some time continued, by the false acknowledgment and recognition of each other as husband and wife for a space kept up, and by an ill-founded general reputation, grow into the real valid and lawful state of matrimony, with all its reciprocal rights, liabilities, duties and obligations.

We shall not relax any rule or requirement which has been set up for a validity of a marriage. The law is well settled that a man and woman, without the presence of a witness,

without the intervention of minister or magistrate, by words of present contract between them, may take upon themselves the relation of husband and wife, and be bound to themselves and to society as such. And if after that the marriage is denied, proof of actual cohabitation as husband and wife, acknowledgment and recognition of each other, to friends and acquaintances and the public as such, and the general reputation thereof will enable a court to presume that there was, in the beginning, an actual *bona fide* and valid marriage.

We are aware, however, that the wise caution of the courts has set hedges about this rule. To presume, from the fact of cohabitation, that there has been an actual marriage, it must be matrimonial and be so begun, and not illicit. It is not the fact alone which raises the presumption, but the character of the fact. The parties must not only live together as do man and wife, but to become man and wife must be a purpose in beginning so to live, and they must hold themselves out to the world as thus related. (*Rose* v. *Clark*, *supra*.) And the courts will not, by testimony that is not clear and explicit, that is not general and supported by other circumstances, nor by reputation for marriage that is divided, raise such a presumption. (*Clayton* v. *Wardell*, 4 Comst., 230.) And the presumption is weakened where the relation of the parties is secret or concealed, unless an adequate and controlling motive is presented. (*Cunningham* v. *Burdell*, 4 Bradf., 482.)

And when this case comes to its final hearing and disposition, these restrictions and safeguards should and will be recognized and adhered to.

The question now before us, however, is not whether upon the proofs as shown by the parties a final judgment should be rendered, that there has been an actual valid marriage between the parties, and whether a limited divorce should be adjudged with a permanent, separate maintenance for the plaintiff to be provided by the defendant.

The question now is, do the proofs of the parties give reason to apprehend that upon a trial of the issues between them

there is the fair probability that the plaintiff will maintain her allegations.

This question is to be determined for the purposes of this application. It is one in which the public is interested as well as the parties. If there has been a binding contract of marriage, it is of public as well as private interest that it be shown and maintained. It is evident from what is before us, that it can be shown and maintained only by professional skill and vigor, to secure which to the plaintiff pecuniary means are needed. She is without such means. And if the defendant is her husband he should provide them.

There are facts alleged which are disputed. It is upon these that the strength of the defendant's case rests. There are facts in the case which are undisputed. They are such that from them a presumption arises that the parties were married. And though the complaint in its general allegation of a marriage is generally denied by the answer, and resting upon these alone the general rule would defeat the plaintiff's application, yet the petition, affidavits and other papers in the case furnish the court with fuller details and particulars of the case and of the relations of the parties, and, from the undisputed facts therein showing in presumption an actual marriage, bring into operation in aid of the plaintiff the qualification of the general rule which has been stated above.

It is as if in the first instance the plaintiff in her complaint had alleged the facts and circumstances from which an actual marriage, was to be inferred, and had also alleged the marriage contract as she has in her petition; and as if the defendant had in his answer denied the contract of marriage, but admitted by not denying them, the facts and circumstances presumptive of marriage, and alleged of them that, though apparently proper and rightful, they were but the cover for a meretricious and libidinous connection, begun and continued in impurity. It is evident that the issue would be in the main upon the character of the connection between the parties, and whether this seeming marital relation began in an honorable and legal contract of marriage, though entered into without

witness, form or ceremony of solemnization; or whether it was the unsanctioned for gathering of a lecher and a wanton.

It is evident that the affirmative of this issue would be upon the defendant, so far as to repel the presumption of an actual marriage to be made from the facts and circumstances which stand undisputed upon the papers. *Prima facie*, then, there would exist the relation of actual mariage, and the right to alimony *pendente lite*, and money to contest the allegations which, if established, would show no marriage.

It follows, then, that the court below had jurisdiction and power, so far as the facts of the case are concerned, to grant the application of the plaintiff.

This being so, the statute (2 R. S., 148, § 58) gives, in express terms, the power to the court, in such a case as this, to require the husband to pay any sums necessary to enable the wife to carry on the suit during its pendency. And, though the statute does not, in terms, give to the court the same power as to an allowance for her support and maintenance, pending the controversy, yet this power is based upon the general equitable jurisdiction of the court, and upon the ground that when the statute conferred jurisdiction upon the court in those actions for divorce which, by the English law, are solely cognizable in the ecclesiastical courts, the grant of that jurisdiction carried with it, by implication, the incidental powers which were indispensable to its proper exercise, and not in conflict with our own statutory regulations on the same subject. See *Griffin* v. *Griffin* (47 N. Y., 134), where this subject is elaborately considered.

2d. The defendant makes another point, that the plaintiff was not an actual resident of this State when she exhibited her complaint.

The language of the statute is: "If a married woman, at the time of exhibiting a bill against her husband, * * * shall reside in this State, she shall be deemed an inhabitant thereof, although her husband may reside elsewhere" (2 R. S., 147, § 57); and an action may be entertained for a limited divorce, when the marriage shall have taken place within this

state, and the wife shall be an actual resident at the time of exhibiting her complaint. (Id., 146, § 50, sub. 2.)

The complaint alleges that the plaintiff was, at the time of the commencement of this action, an actual resident of the city of New York. If there was a marriage, it took place in that city.

The answer denies all the allegations of the complaint.

It is, then, one of the issues in the case, whether the plaintiff was an actual resident or not of this State at the time of exhibiting her complaint. The denial thereof in the answer does not of itself take from the court the power of awarding temporary alimony and expenses of the suit, no more than does a denial of the allegation of abandonment and neglect, and refusal to support. These are of the issues in the case. If the plaintiff is the wife, in fact, of the defendant, the court has the power to take from his means to enable her to maintain her allegations.

Besides that, actual residence is capable of change in a brief space, and it might be that, though all that is shown in the affidavits and papers of the defendant is true, the plaintiff, after the dates spoken of therein, and before the commencement of this action, did form the intention, and carry it into performance, of changing her residence from Memphis to New York city.

3d. The defendant makes another point, that the plaintiff had, before the bringing of this action, brought another action against the defendant in a court of the State of Tennessee, which is still pending and undetermined.

It appears that the judgment prayed for in that action is for a divorce *a vinculo*, or for a limited divorce, and on either judgment an allowance for permanent alimony. And it alleges the adultery of the defendant as a ground for a judgment.

If it be conceded, notwithstanding some difference in the allegations of the two complaints, and the difference in the prayer for judgment, in the two, that the two actions are identical, still the same answer to this point arises. This is

one of the issues in the case, and is not of conclusive weight on a motion of this kind. Upon the trial, the plaintiff may show a discontinuance of that action, or other reason, why it may not interfere with the courts of this State taking jurisdiction of the controversy.

4th. The defendant makes another point, that the question of alimony is *res adjudicata*, in consequence of a decree in the court of Tennessee denying it to the plaintiff.

It is the rule that the definitive judgment of a court of another State between the same parties upon the same cause of action, upon the merits of the case, is conclusive. But it must be a definitive judgment on the merits only. (*Walsh* v. *Durkin*, 12 J. R., 99; *Lazier* v. *Westcott*, 26 N. Y., 146.)

But the decree of the court in Tennessee was not a final decree adjudicating definitively between the parties the merits of the case. It was interlocutory. Its determination of the question before it did not settle and adjudge finally the rights of the parties. It was upon a special application pending the suit, which by our practice might, on leave had, be renewed on a new state of facts presented.

It would be too much to say that the decision there of this interlocutory motion or application was to be held conclusive upon the parties at any other stage of the main controversy between them, in another State and before another tribunal.

We are therefore of the opinion that the Special Term had power to entertain the application of the plaintiff for alimony *pendente lite*, and for money to defray the expenses of the action, and had power to pass upon the facts presented in the papers before it, and from the facts which were undisputed had power to award to the plaintiff temporary alimony and money for costs of suit. What amount it should give was discretionary. We are free to say that under the circumstances of the case, we should have confined the plaintiff to the smallest sum. But with the discretion of the court below we cannot interfere.

The order appealed from must be affirmed, with costs to the respondent.

Statement of case.

The plaintiff claims that the order complained of is not appealable to this court. We do not pass directly upon that question. If the granting of the order was entirely discretionary, and there has been no abuse, then it is not appealable. If there was no power to grant it, it was appealable.

We have preferred to pass upon the merits of the question, and to affirm the order.

All concur, except PECKHAM, J., dissenting.

Order affirmed.

JOSEPH WORSTER, Respondent, *v.* THE FORTY-SECOND STREET AND GRAND STREET FERRY RAILROAD COMPANY, Appellant.

The right of a railroad company to lay its tracks in a street or public highway carries with it the obligation to lay them in a proper manner and to keep them in repair; and if an injury occnrs, by reason of a neglect in either of these respects, it is liable.

No notice to it of a patent defect is necessary; but when it appears that the defect existed and an injury was caused thereby, the presumption of negligence is complete. If circumstances exist showing absence of negligence, as that the defect had not existed for a sufficient length of time to create a presumption of knowledge, or to enable it to repair, it is for the company to prove.

(Argued June 11, 1872; decided November 12, 1872.)

APPEAL from judgment of the Court of Common Pleas for the city and county of New York, reversing a judgment of the General Term of the Marine Court of the city of New York which affirmed a judgment of the Special Term entered upon an order dismissing plaintiff's complaint.

The action was brought to recover damages for injuries sustained by a horse of plaintiff's, occasioned by an alleged defect in defendant's track.

Defendant owns and operates a railroad running through and over Houston street in the city of New York. On the 12th of April, 1864, plaintiff was driving a pair of horses belonging to him over the track, one horse stepped into a hole, was thrown down and injured, and in consequence died.

Statement of case.

The court dismissed the complaint upon the ground that there was no evidence showing defendant was aware of the bad condition of its track, or that the same was in such condition for a length of time that would imply knowledge.

Moses Ely for the appellant. Mere proof of the existence of the defect was not sufficient to raise a presumption of negligence; notice or an existence of the defect for a sufficient time to imply it should have been proved. (Shearman and Redfield on Negligence, § 407; *Requa* v. *The City of Rochester*, 45 N. Y., 129; *Hudson* v. *The Mayor, etc., of New York*, 9 id., 163; *Griffin* v. *The Mayor, etc., of New York*, 9 id., 456; *McGinity* v. *The Mayor, etc., of New York*, 5 Duer., 674; *Hart* v. *City of Brooklyn*, 36 Barb., 226.)

J. H. Anthon for the respondent. A railroad company having laid its track along a street is bound to lay it down properly and to keep it in a proper condition thereafter. (*Fash* v. *The Third Ave. R. R. Co.*, 1 Daly, 148; *Cook* v. *N. Y. Floating Dry Dock Co.*, 1 Hilt., 436; Shearman and Redfield on Negligence, 497; *Mazetti* v. *Harlem R. R. Co.*, 3 E. D. Smith, 98; *G. West. R. R. Co.* v. *Brand and Fawcett*, 1 Moore P. C. [N. S.], 101; Act of 1850, chap. 140, § 28; *Virginia Central R. R. Co.* v. *Sanger*, 15 Grattan [Va.], 230; *Cumberland Valley R. R. Co.* v. *Hughes*, 11 Penn., 141.) No notice was necessary. (*Grote* v. *Chester R. R. Co.*, 2 Exch., 251; *Barton* v. *The City of Syracuse*, 36 N. Y., 54, 57, 58; *Hutson* v. *The Mayor, etc., of New York*, 9 id., 163; *Griffin* v. *The Mayor, etc., of New York*, 9 id., 456.) Contributory negligence of the city corporation, when negligence of the railroad company is distinctly proved, is no defence. (*Fash* v. *Third Ave. R. R. Co.*, above cited; *Gillett* v. *The Western R. R. Co.*, 8 Allen [Mass.], 560; *Carpenter* v. *C. P. N. and E. R. R. R. Co.*, 11 Abb. P. R. [N. S.], 416.) Negligence is presumptively shown by evidence of the condition of the road at the time of the accident. (*Gt. West. R. R. Co.* v. *Fawcett*, above cited; *Milwaukee and Chicago R. R. Co.* v. *Hunter*, 11 Wis., 160.)

Opinion of the Court, per CHURCH, Ch. J.

CHURCH, Ch. J. We are to assume that the defendants had a lawful right to lay their tracks in the street, where the injury occurred, but this right carries with it the obligation to lay the tracks in a proper manner and keep them in repair, and if an injury occurs by reason of neglect in either of these respects the defendants are liable in damages. (*Fash* v. *Third Ave. R. R. Co.*, 1 Daly, 148; 11 Penn., 141.) The defect was immediately connected with the track, and was plainly visible to the employes of the defendants, who were constantly operating the road. The duty of remedying the defect was affirmative and absolute. Notice to the defendants of the defect was not necessary. (35 N. Y., 58.) It was their duty to know it. It was patent, and an omission to know that such a defect existed was *prima facie* negligence as much as an omission to repair after notice. The facts tended to prove that the defect had existed for some days. The learned judge who presided nonsuited the plaintiff because the defendants had no notice of the defects, and because they had not existed for such a length of time as to create the presumption of knowledge. The ruling was erroneous. The presumption of knowledge arises from the existence of the defects themselves. The plaintiff was only required to show that the injury resulted from the road being out of repair, and if circumstances existed showing absence of negligence it was for the defendant to prove them. The presumption of negligence was complete when it appeared that defects existed and an injury was caused thereby. In some cases notice to municipal corporations, express or implied, of defects or obstructions in the streets, is requisite to create a liability for damages for an injury produced by reason of them, but the authority of these cases has no application here. (*Hutson* v. *Mayor, etc.*, 9 N. Y., 163; *Griffin* v. *Mayor*, id., 456.)

The judgment of reversal must be affirmed.

All concur.

Judgment affirmed.

Statement of case.

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SAMUEL KELLINGER, Appellant, v. THE FORTY-SECOND STREET AND GRAND STREET FERRY RAILROAD COMPANY, Respondent.

The owners of property adjoining a street in the city of New York, laid out under the act of 1813, have an easement in the street, in common with the whole people, to pass and repass, and also to have free access to their premises; but the mere inconvenience of such access occasioned by the lawful use of the street by a railroad is not the subject of an action.

Plaintiff's complaint alleged that defendant laid its track so near the sidewalk, in front of his premises, as not to leave sufficient space for a vehicle to stand, and that he and his family are thereby incommoded in leaving and returning to their residence, and the rental value of his premises is greatly depreciated. On demurrer,—*Held*, the complaint did not contain a cause of action.

(Argued June 12, 1872; decided November 12, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming an order sustaining a demurrer to plaintiff's complaint, and affirming a judgment entered upon such order.

The complaint of the plaintiff alleged in substance that he was the owner of certain premises situate upon Union square, in the city of New York, in front of which defendant had laid and constructed its tracks; that one of the tracks was in such close proximity to the sidewalk, in front of his premises, as to interfere with, impede and prevent his complete enjoyment of the use and occupation of said premises; that there was not sufficient space between the sidewalk and the track to admit of any kind of vehicle to be driven to or remain in front of his premises, and that he is thereby prevented from driving his family carriage up to the sidewalk either to receive or return his family without great risk, and that by reason of the proximity the value of his premises is greatly impaired and the rental diminished; that defendant's road was constructed without obtaining plaintiff's consent, and without taking any proceedings to acquire title. Plaintiff asked judg-

Statement of case.

ment for the damages, and also for an injunction restraining defendant from the use and occupation of said track. Defendant demurred, "that the complaint does not state facts sufficient to constitute a cause of action."

Edward Mackinley for the appellant. A grant by a public officer or body to a private party is to be interpreted in favor of the grantor and the public. (*Mohawk B. Co.* v. *U. and S. R. R. Co.*, 6 Paige, 554.) Plaintiff has an easement in the street, of which he cannot be deprived without consent or compensation. (Laws of 1860, p. 211; 10 Barb., 367; 16 N. Y., 109; 1 Sand., 341; 7 Barb., 535, 551.) The construction of a railroad is an appropriation of a street for a purpose dehors that for which the fee was surrendered. (39 N. Y., 410, 411.) Any person who suffers a peculiar injury from a public nuisance may maintain an action. (27 N. Y., 193.) This use of the street alleged in the complaint is a public nuisance. (*Hart* v. *Mayor*, 3 Paige, 213, and 9 Wend., 571; *Wetmore* v. *Tracy*, 14 Wend., 250; *Stetson* v. *Faxon*, 19 Pick., 147; *Mosher* v. *U. and S. R. R. Co.*, 8 Barb., 427; 37 id., 380; 7 id., 516, 518, §§ 5, 9; 37 id., 394, 399, 402, 403, 411, 412; 7 id., 543.) Ingress and egress to and from real property are constitutional and natural rights that inherently surround the soil and ever attend upon its proprietorship. (*The First Baptist Church* v. *The U. and S. R. R. Co.*, 6 Barb., 313; *The First Baptist Church* v. *S. and T. R. R. Co.*, 5 id., 79; *Drake* v. *The Hud. R. R. R. Co.*, 7 id., 508; *Mosher* v. *U. and S. R. R. Co.*, 8 id., 427; *Chapman* v. *The A. and S. R. R. Co.*, 10 id., 360; *Fletcher* v. *The A. and S. R. R. Co.*, 25 Wend., 462; *The, etc., Waterloo* v. *The A. and R. R. R. Co.*, 3 Hill, 567; *Renwick* v. *Morris*, 3 Hill, affirmed; 7 Hill, 575; *Peckham* v. *Henderson*, 27 Barb., 207; *Corning* v. *Louerre*, 6 John. Ch., 439; *Brown* v. *The C. and S. R. Co.*, 12 N. Y., 486; *Doolittle* v. *Supt. Broom Co.*, 18 id., 160; quoting and approving *Corning* v. *Louerre*, 6 John. Ch., 439; *Davis* v. *The Mayor*, 14 N. Y., 506; *Williams* v. *The N. Y. C. R. R. Co.*, 16 id., 97;

Stetson v. *Paxon*, 19 Pick., 250; 4 Hill, 76; 21 Barb., 409; 2 Dut. [N. J.], 148; Broom's L. M., 191, 357.)

Moses Ely for the respondent. When a railroad company has acquired a right to lay its tracks through a street, it is not a nuisance, and is not liable for any consequential damage, unless guilty of misconduct or neglect. (*Williams* v. *The N. Y. C. R. R. Co.*, 16 N. Y., 97, 104; *Chapman* v. *The A. and S. R. R. Co.*, 10 Barb., 360; *People* v. *Kerr*, 37 id., 357; S. C., 27 N. Y., 188.)

CHURCH, Ch. J. It is not alleged in the complaint that the plaintiff owns the fee of the street in front of his premises, nor that the track of the defendant's road was unnecessarily or negligently or willfully laid so near the sidewalk as to impair the use of his premises and depreciate its rental value.

We cannot take judicial notice of the width of the street at that point, nor but that the track of the road was laid in the only available space vacant for that purpose. Nor is it alleged that the grade of the street has been changed, or that there is any physical obstruction to free access to the plaintiff's premises, nor any practical difficulty in passing over the track. The gravamen of the action is that the defendant has laid the track of its road so near the sidewalk as not to leave sufficient space for a vehicle to stand, and that the plaintiff and his family are thereby incommoded in leaving and returning to their residence, and that the rental value of said premises is greatly depreciated. The action is based upon the idea that the easement in the street, which the plaintiff is entitled to, has been and is being interfered with, and that he is entitled to compensation for the injury occasioned by such interference and an injunction to restrain the defendant from using their railroad. The corporation of the city of New York has acquired by grant, dedication or confiscation the title in fee to the land on which the streets are laid, but the title thus vested is held not as private property, but in trust for public use, and such as was acquired under the act of 1813 is

by that act expressly declared to be held in trust for the purpose of maintaining public streets. In *The People* v. *Kerr* (27 N. Y., 188), this court held that the trust of the city was *publici juris*, held not for the benefit of the people of the city alone, but for the people of the whole State, as the agent of the State, and a part of its governmental machinery, and that consequently the absolute control and direction of the trust was in the legislature as the superior power; that legislative authority to construct a railroad on the surface of the streets without a change of grade was a legitimate exercise of the power of regulating public rights for public uses, and that the city was not entitled to compensation, because it had as a corporation no property which was appropriated.

It is not quite clear as to what was intended to be decided relative to the rights of abutting owners. The opinion of WRIGHT, J., which the case states was acquiesced in by a majority of the judges, affirms explicitly that such owners had no property, estate or interest in the land forming the bed of the streets in front of their respective premises, to be protected by the constitutional limitation upon the right of eminent domain; that they had no reversionary right, and even if they had, it was only a possibility so limited as to be subsequent in enjoyment to a prior present ownership that might last forever, and was not property entitled to protection from appropriation by the will of the government, and that if it was, it had no appreciable value. Two of the judges queried whether such owners might not have some interest, independent of the rights which the public had acquired to have free access to their premises, but thought that no such question was involved in the case.

We should feel bound to adhere to this decision, and its necessary legal results, even if we doubted its soundness, because large sums of money have been expended upon the faith of it, and in many obvious ways it has become a rule of property which should never be abrogated except for the most cogent reasons. It is, however, strenuously insisted by the plaintiff that the decision does not reach the point

involved in this case, but I am unable to see why it does not. It clearly holds that the abutting owners had no property in the street which was taken for the railroad, for which they were entitled to compensation, and in this respect the case is distinguishable from *Williams* v. *N. Y. C. R. R. Co.* (16 N. Y., 97); *Craig* v. *Rochester City and B. R. R. Co.* (39 N. Y., 404), and other kindred cases which hold that the laying of a railroad in a street or highway is an additional burden to the easement which as *against the owners in fee* the public had previously acquired, and for which such owners were entitled to compensation. These decisions have no application when the fee as well as the easement is vested in the public. This distinction is expressly recognized in these cases. In the former, SELDEN, J., said: "No case is likely to arise in the city of New York which would be entitled to any weight in the decision of this question for the reason that it is claimed, and apparently with much justice, that as to a large portion of the streets in that city the fee of the land, and not mere easement, is vested in the corporation." The railroad of the defendant is not therefore a public nuisance. It was authorized by the sovereign power of the government. If it had been a public nuisance, the adjoining proprietor being specially incommoded and injured, could maintain an action. (6 Barb., 313; 37 id., 357, and cases there cited.) The basis of his action would have been that he suffered a peculiar inconvenience not common to all the inhabitants of the State, resulting from the public wrong of obstructing the street. In this case the foundation of such an action is wanting, viz.: the unlawfulness of the act. It was authorized by law, and adjudged by this court to be for public use and within the uses to which the streets may be devoted. The fee being in the public, the legislative authority can lawfully consent to modify, regulate or enlarge its use for the benefit of the public. If these positions are sound, the corporeal rights of property of the plaintiff have not been impaired. Neither his property nor any right of property has been taken from him or injured, and his injuries are referable to that class of incidental disadvantages

to which he is subjected resulting from the lawful exercise of the absolute power of control vested in the State, in connection with the title to the fee of the land. This, I think, necessarily results from the principles determined in *The People* v. *Kerr*, *supra*.

The abutting owners have an easement in the street in common with the whole people to pass and repass, and also to have free access to their premises, but the mere inconvenience of such access occasioned by the lawful use of the street is not the subject of an action.

There are expressions in some of the opinions apparently favoring the idea that such an action may be maintained. It was said in *Drake* v. *Hudson R. R. R. Co.* (7 Barb., 508), that for contingent and consequential injuries, the parties aggrieved are not entitled to compensation as for property taken for public use, but that an action will lie for such injuries. The force of this remark is spent in limiting it to the statement that such injuries are not a taking of property within the meaning of the Constitution, without intending to define what injuries might be recovered for by an action, and this view is confirmed by another portion of the same opinion, in which it is said that adjoining owners have no exclusive right in the streets, but that all other citizens, including railroad companies, have equal rights, subject to the control of the public authorities. If this is so, there is no principle which will sustain an action for incidental injuries growing out of a lawful regulation by the public. When it is determined that a horse railroad is a public use of the street, the question is settled, that incidental inconveniences must be submitted to. They become merged in the superior interest of the public. The decision in *Fletcher* v. *Auburn & S. R. R. Co.* (25 Wend., 462) is cited and relied upon by the plaintiff. There the defendants were authorized to build a railroad upon a line to be selected by themselves, and to cross public highways, by restoring them to their original usefulness. In crossing the highway near the plaintiff's premises, they raised an embankment, which obstructed free access and otherwise

injured his property, and they were rightfully held liable for the damages. The power exercised in that case by the legislature was entirely unlike that exercised here.

In the first place, the fee of the highway was assumed to be in the adjoining owner, and the court held that the legislature had not and could not, without compensation, authorize the injury complained of, and that all that the legislature professed to do was to protect the defendants from prosecution by the public for obstructing the highway, leaving the rights of the plaintiff untouched. The authority was in no sense a regulation of the use of the highway, but a privilege granted free, as against the public only. Similar views are applicable to the case in 2 Dutch., 148. These and like cases are reconcilable with *The People* v. *Kerr*, *supra*, upon the difference between the extent of the rights and powers of the public authorities, possessed and exercised in the different cases, although the expressions of judges may seem to conflict. It is conceded that the authority to lay a railroad in the streets in the city of New York is lawful without compensation or liability to adjoining owners, and yet the laying of such road even in the widest streets may be and often is a disadvantage and injury to the property adjoining the street, rendering it less accessible and desirable and less valuable. If this action can be maintained, I see no reason why in all cases of inconvenience and injury a similar action might not lie. The principle would be the same, and the injury would be only a question of degree. Such a result would not only overthrow previous adjudications, but would unsettle rights of property to an incalculable amount, and inflict serious injury upon the public. But while we feel bound to hold that this action cannot be maintained upon the allegations contained in the complaint, we do not intend to determine that there are no circumstances which will justify an action. All the authorities concur that an injury to private rights or property, committed through negligence or willful misconduct, even though in the pursuit of a lawful purpose, may be redressed by an action.

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We are not called upon to determine what acts would amount to negligence so as to give a cause of action. That question is not before us.

The judgment in this case must be affirmed, with leave to the plaintiff to amend the complaint, on payment of costs.

All concur.

Judgment accordingly.

MILTON S. PRICE, Appellant, *v.* THE OSWEGO AND SYRACUSE RAILWAY COMPANY, Respondent.

Where a common carrier without requiring evidence of identity delivers goods to a stranger, which have been fraudulently ordered by the latter in the name of a fictitious firm, and which have been shipped in compliance with the order directed to the fictitious firm, he is liable to the consignor for their value. (CHURCH, Ch. J., dissenting.)

(Argued June 6, 1872; decided November 12, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of defendant, entered upon the report of a referee. (Reported below, 58 Barb., 599.)

The action was brought against defendant as common carrier to recover the value of three bales of bags shipped by plaintiff at Syracuse, consigned to S. H. Wilson & Co., Oswego. The facts are stated sufficiently in the opinion.

D. Pratt for the appellant. Defendant was guilty of negligence in delivering the goods to an unknown person without requiring the customary evidence of his identity. (*Stevenson* v. *Hart*, 4 Burg., 476; *Duff* v. *Budd*, 3 Brod. & B., 177; *Berkett* v. *Willan*, 2 Barn. & Ald., 356; *Winslow* v. *The Verm. and Mass. R. R. Co.*, 42 Vt., 706; 1 Amer. R., 365; *Fletcher* v. *Amer. Ex. Co.*, 25 Ind., 493; *McKeon* v. *McIvor* [L. R.], 6 Exe., 36; Alb. Law Jour., March 4, 1871, p. 164.) Defendant is liable for delivering the property to a party other than to the party to whom it was consigned.

(*Fisk* v. *Newton*, 1 Den., 45; Story on Bailm., 545, *b*; *Powell* v. *Myers*, 26 Wend., 591; *Stephenson* v. *Hart*, *supra*; *Duff* v. *Budd*, *supra*; *Winslow* v. *Verm. and Mass. R. R. Co.*, *supra*.)

Edwin Allen for the respondent. Any delivery which discharges the carrier as between him and the consignee is good and valid as against the consignor. (*Sweet* v. *Barney & Co.*, 23 N. Y., 335; 11 Metc. R., 509.) The defendant, as common carrier, is not liable for a wrongful or negligent delivery of the goods, under the proof and findings. (*Hugh* v. *The London and Northern R. R. Co.*, 5 Law R., 57 Exc.; *Duff* v. *Budd*, 3 Brod. & Bing., 177; *Stephenson* v. *Hart*, 4 Bing., 476; *Burnell* v. *N. Y. C. R. R. Co.*, 45 N. Y., 480; *Grant* v. *Morse*, 22 id., 323; *Oberlander* v. *Spiess*, 45 id., 179.)

GROVER, J. The referee found as a conclusion of law, from the facts found, that the defendant having delivered the bags to the person who made the order for them (although in the name of a fictitious firm) without notice of the fraud, was not liable to the plaintiff therefor. To this conclusion the appellant excepted. The counsel for the respondent insists that if the legal conclusion is not sustained by the facts found, the court will assume that he found such additional facts as were necessary for that purpose. This position is correct, subject, however, to the qualification that it must appear from the case that such additional findings would have been warranted by the evidence. (*Oberlander* v. *Spiess*, 45 N. Y., 175.) In the present case there was no evidence warranting the finding of any additional facts sustaining the legal conclusion. The question, therefore, is whether such conclusion is sustained by the facts found. The facts (so far as material) found were: That the plaintiff, on and prior to September, 1866, was a dry-goods merchant, doing business in Syracuse. That the defendant was a common carrier of goods between Syracuse and Oswego. That a few days prior to the 10th of September, 1866, Caleb B. Morgan, a resident of Syracuse, received a let-

ter by mail, dated and mailed at Oswego, directed to him at Syracuse, signed S. H. Wilson & Co., inquiring the price of bags. That Morgan had been a dealer in bags, but had given up the business, and upon receipt of the letter he delivered the same to the plaintiff, who kept bags for sale, and requested the plaintiff to inform him of the price of the said bags. That Morgan did not know any person or firm by the name of S. H. Wilson & Co., nor had he heard of any such person or firm, but delivered the letter to the plaintiff, believing it had been written in good faith in the ordinary course of business by a firm wishing to purchase bags. That the plaintiff upon receipt of the letter gave to Morgan the prices of bags, who communicated them in a letter, addressed and mailed by him to S. H. Wilson & Co., Oswego. That afterward, and on the 10th or 11th of September, the plaintiff received through the post-office at Syracuse a letter, mailed at Oswego, as follows:

"OSWEGO, *Sept.* 10, 1866.

"Mr. MILTON PRICE.—*Sir:* We are in want of some bags, and wrote Mr. Morgan, supposing he was in the trade, and he has quoted your prices for stock, etc. Please send us by rail 100 of each, and hope you can make the price a little less, and will be able to give you a larger order soon. Please send bill by mail, and we will remit check for amount of same.

"(Signed) S. H. WILSON & CO."

That on the 13th September, 1866, the plaintiff, with a view of complying with the order, delivered to the defendant at Syracuse three bales of bags, of the value of $205, directed to S. H. Wilson & Co., Oswego, and the defendant undertook, as a common carrier, to carry the bags to Oswego, and there deliver them to the consignees, and also mailed a bill of the bags to S. H. Wilson & Co., Oswego. That the defendant carried the bags to Oswego the same day, and soon after their arrival at Oswego and on the same day, a man called at the office of the defendant there, and asked defendant's agent if three bales of bags, directed to S. H. Wilson & Co., had arrived. He was informed that they had,and he then said

they were what he wanted, and offered to and did pay the freight thereon, and they were delivered to him by the agent of the defendant upon signing a receipt therefor in the name of S. H. Wilson & Co., and they were taken away. That the plaintiff did not know any person or firm by the name of S. H. Wilson & Co., and had no information of any such person or firm, except what was contained in their letter to him of September 10th and in the letter to Morgan. In fact, there was no such firm of S. H. Wilson & Co. in business at Oswego or elsewhere, and the letters written in the name of S. H. Wilson & Co. and the order were a part of a scheme on the part of some person or persons to defraud the plaintiff of his property, and no part of the purchase price has been paid, nor has the property been recovered or the person who received the same from the defendant been traced. That the defendant, when said bags were received and delivered, did not know any person or firm by the name of S. H. Wilson & Co., nor did the defendant know the person to whom the bags were delivered, nor did they require any evidence of the identity of the person or of his being connected with the firm of S. H. Wilson & Co. That it was the usual custom of the defendant not to deliver goods to a stranger without his being identified or his satisfying the defendant by papers or otherwise that he was entitled to receive them; and further, that reasonable care and prudence required such precautions to be taken. That the person to whom the bags were delivered by the defendant was the person who wrote the letters signed S. H. Wilson & Co., or his authorized agent to receive said bags in case they should be sent pursuant to the order of September 10th. That there was no evidence from which it could be found whether his name was S. H. Wilson or not. That when the plaintiff sent the bags he supposed that S. H. Wilson & Co. was the name of a firm at Oswego, and when the defendant delivered them at Oswego they had no knowledge of the fraud, and supposed that the person to whom they were delivered was a member of or represented the firm of S. H. Wilson & Co. It is the duty of a carrier to carry the goods

to the place of delivery and deliver them to the consignee. When goods are safely conveyed to the place of destination and the consignee is dead, absent or refuses to receive, or is not known and cannot after reasonable diligence be found, the carrier may be discharged from further responsibility as carrier by placing them in a proper warehouse for and on account of the owner. (*Fisk* v. *Newton*, 1 Denio, 45.) The responsibility continues as carrier until discharged in the manner above stated. Hence, a delivery to a wrong person, although upon a forged order, will not exonerate the carrier from responsibility. (*Powell* v. *Myers*, 26 Wend., 591.) In examining the cases, the distinction between the liability of carriers and warehousemen must be kept in mind. The former is responsible as insurer. The latter for proper diligence and care only, in the preservation of the property and its delivery to the true owner. The former must, at their peril, deliver property to the true owner, for if delivery be made to the wrong person, either by an innocent mistake or through fraud of another, they will be responsible, and the wrongful delivery will constitute a conversion. (*McEntee* v. *The New Jersey Steamboat Co.*, 45 N. Y., 34.) It is of the liability of a warehouseman after the responsibility as carrier had terminated that the chief judge is speaking in the opinion in *Burnell* v. *The N. Y. Central R. R. Co.* (45 N. Y., 184), where he holds that the defendant was responsible only for due care and diligence. In the present case, the goods were consigned to S. H. Wilson & Co., Oswego. This plainly indicated some person, or rather persons, known by and doing business under that name. But as there was no such firm, and so far as the findings or case show never had been, delivery could not be made to the consignees. Then, as already seen, it became the duty of the carrier to warehouse the goods for the owner. Instead of this, the defendant delivered them to a stranger without making any inquiry as to who or what he was, simply upon his inquiring if such goods for Wilson & Co. had arrived, and upon being informed that they had, saying that he wanted them. If the case had been determined by the

referee upon the question whether due care had been used by the defendant, it would have been necessary to determine whether the goods were at the time held as carrier or as bailee of another character, as in the latter case only will the exercise of proper care exonerate from liability for the loss of the property. But as the legal conclusion of the referee shows that the judgment was not based upon any finding upon that question, but upon the legal conclusion of the referee, that the defendant was discharged from liability by having delivered the goods to the person who wrote the letters and orders, or his authorized agent, it is unnecessary to determine whether the defendant at the time held the goods as carrier or warehouseman, because if the legal conclusion is correct, a delivery to this person or his agent would have discharged the defendant in either case, entirely irrespective of the degree of care exercised in making delivery. The entire findings of the referee show that he would have held the defendant liable had the delivery under a like state of facts been made to any other than this person. The opinion of the learned judge, given at the General Term, shows that the judgment was affirmed by that court upon the same ground, and that the case would have been differently decided had the delivery been made to some other person. Indeed, this is the only reason that can with any plausibility be given for the judgment. As a finding, that proper care had been exercisedby a bailee of goods whose duty it was to keep them for the owner, when he had delivered them to an entire stranger who claimed to be the owner, and gave no evidence of his right except to make inquiry if they had arrived for the consignee, and saying that he wanted them, would be wholly unsupported by the evidence. The question is whether the person who wrote the order acquired a right, so far as the defendant was concerned, to a delivery of the goods; in other words, whether as to it he was the consignee. If he was, the conclusion of the referee was correct. In that case, delivery to him discharged the carrier upon the principle that any delivery, valid as to the consignee, is a defence for the carrier as to all persons. It

would hardly be claimed, in case there had been a firm doing business at Oswego under the name of S. H. Wilson & Co., a swindler would make himself consignee of goods or acquire any right whatever thereto, which were in fact consigned to such firm, simply by showing that he had forged an order in the name of the firm directing such consignment. If he would not thereby acquire any right to the goods, delivery to him would not protect the carrier any more than if made to any other person. In *The American Express Co.* v. *Fletcher* (25 Indiana, 492), the facts were that a person claiming to be J. O'Riley presented himself to a telegraph operator, who was also agent of the express company, and presented a dispatch to be forwarded to the plaintiff, signed J. O'Riley, requesting him to send $1,900, which the operator sent through. That in due time the operator, in his capacity of agent for the express company, received a package purporting to contain valuables, addressed to J. O'Riley, whereupon the same person who had sent the dispatch presented himself and demanded the package, which was delivered to him. It turned out that this person was not J. O'Riley, but a swindler. *Held*, that the express company was liable to the plaintiff for the money. The case is silent as to whether J. O'Riley was a fictitious name, but I infer that it was not, as the plaintiff would not be likely to forward that amount of money to a person unknown to him. It will be seen that this was a much stronger case for the company than is that of the present defendant, so far as care was concerned, for the delivery was made to the person known by the company to be the one who sent the dispatch, while the defendant knew nothing whatever about the letters or order or how the goods came to be forwarded, consigned as they were. But the case directly decides that no right to the package was acquired by the swindler by sending a dispatch therefor in the name of another. If no right is acquired by sending a dispatch in the name of a real person, it is a little difficult to see how any is acquired by writing in the name of a firm having no existence, especially when the facts show, as in the present case,

the consignor supposed he was dealing with a substantial business firm, and the consignment showed that it was intended to be made to such a firm.

In *Ward* v. *The Vermont & Mass. R. R.* one Collins represented to the plaintiff that there was a person of the name of J. F. Roberts residing at Roxbury, Mass., and fraudulently induced the plaintiff to consign goods to him. In fact, no such person resided there. Upon the arrival of the goods, Collins went to a truckman and personated Roberts, and as such sent the truckman for the goods, to whom they were delivered by the company. *Held*, that the company was liable to the plaintiff therefor. That, in principle, is like the present case. In this the swindler had in substance represented to the plaintiff that there was a business firm at Oswego wishing to purchase bags, and had fraudulently procured a consignment of bags from the plaintiff to this firm, when in fact there was no such firm. This gave the defendant no right to deliver the goods to any one else. The argument for the defendant is that the plaintiff consigned the goods to S. H. Wilson & Co., and there being no such firm, the person signing the name of the firm to the letter and order was in respect to the goods to be regarded as the firm for the purpose of delivery by the defendant. This is in direct conflict with the intention of the plaintiff, apparent from the consignment. That authorized a delivery to S. H. Wilson & Co., and to no other. There was not a particle of proof that the person who wrote the letter was ever known to any one by that name The consignment did not therefore authorize a delivery to him. The defendant had no knowledge whatever of the letters, and his writing them furnished no evidence to it of his doing business in that name.

Duff v. *Budd* (7 Eng. Com. Law, 399) was a case much like the present. The evidence that the person who received the goods was the same stranger who ordered them in a fictitious name, was equally strong as in the present case, yet there is no intimation that by this fraud he acquired any right to the goods or the defend-

ant any authority to deliver them to him, and the plaintiff was held entitled to recover of the carrier therefor. (See also *Birkett* v. *Willan*, 4 Eng. Com. Law, 540.) *Heugh* v. *The London Railway Co.* (5 Law Exch. Reports, 51), and *McKean* v. *Ivor* (6 id., 36), are relied upon by the defendant. In the former, one Nurse, who had been in the employ of a rubber company which had ceased to do business, wrote and sent to the plaintiff an order for goods in the name of the company. The plaintiff forwarded the goods by the defendant, a common carrier, consigned to the company. The defendant tendered the goods at the place where the company had carried on business. The persons in possession refusing to receive, they were taken away by the defendant, who, according to the course of business, wrote a letter addressed to the company, advising of the receipt of the goods and requesting their removal. Nurse, thereafter came and presented this letter, with an order for the delivery of the goods, signed in the name of the company by him to the defendant, who thereupon delivered the goods to him. *Held*, that the liability of the defendant as carrier was terminated by the tender, and that whether the defendrnt had been negligent in the delivery was a question of fact for the jury. The latter was a case where goods had been sent to a fictitious firm upon a fraudulent order, by the plaintiff, consigned to the firm at 71 George street, Glasgow, that being the address specified in the order by the defendant, a carrier, who upon the arrival of the goods followed the usage universal among carriers at Glasgow, which was to send notice of the arrival of the goods, with a request for their removal. This notice was received by the one giving the order, who indorsed the name of the firm thereon and presented it to and obtained the goods from the defendant. *Held*, that the defendant having delivered the goods according to the universal usage of carriers, had complied with the directions of the consignor, which must be taken as including such usage, and was therefore not liable.

In *Stephenson* v. *Hart* (4 Bing., 476) it was expressly held that the carrier had no right to make delivery to the

writer of the fictitious order. But it is said that the plaintiff intended the goods should be delivered to the writer of the order. Not at all. He did not consign them to the writer of any order, but to Wilson & Co. This is the only evidence of his intention as to the persons to whom delivery should be made. It is further said that it was the plaintiff's negligence in forwarding the goods without ascertaining that there was in fact such a firm. I am unable to see what the defendant had to do with this. Its duty was to deliver to the firm, and if that could not be found, to warehouse and keep for the owner. The same might be said in every case where goods were forwarded to a consignee supposed to be at a particular place, but who in fact was not there. The usage of the defendant cannot avail him in this case. The referee has found just what was done. This accords with the evidence, in which there was no conflict.

The judgment appealed from must be reversed, and a new trial ordered, costs to abide event.

All concur, except CHURCH, Ch. J., dissenting, and ALLEN, J., not voting.

Judgment reversed.

DANIEL FAVILL, Respondent, *v.* GILBERT L. ROBERTS et al., Appellants.

Where a will gives to the executor no authority to sell the testator's real estate or to control it, but with the knowledge of the heirs he applies to the court and obtains an order authorizing him to sell, and with the consent and at the request of the heirs he does negotiate a sale, receives the purchase-money and conveys by deed, the heirs also informing the purchaser that the executor is the authorized agent to make the sale; the purchaser has a right without further inquiry to rely upon the truth of such assurances, and the heirs are estopped from disputing them or thereafter asserting title to the land conveyed upon the ground of want of authority in the executor. And where the purchaser has paid the contract-price, entered into possession, and made valuable improve-

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ments, with the knowledge of the heirs, he can maintain an action against them to compel them to execute a conveyance to him so as to give him a valid title of record. (ALLEN, J., dissenting.)

The cases of *Brewster* v. *Striker* (2 N. Y., 19) and *Striker* v. *Mott* (28 id., 82), distinguished.

(Argued June 13, 1872; decided November 12, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff, entered upon the decision of the court at Special Term. (Reported below, 3 Lans., 141.)

This action was brought by the plaintiff to compel the defendants, heirs of John Roberts, to execute a conveyance to him of a certain farm in the town of Reading, in Schuyler county, which Lewis Roberts, one of the executors of the last will and testament of said John Roberts, agreed and undertook to convey to the plaintiff. The facts sufficiently appear in the opinion.

The court below decided that defendants were in equity bound by the agreement entered into by Lewis Roberts as executor, and were estopped from questioning his authority, and that plaintiff was entitled to a judgment directing defendants to make, execute and deliver a good and sufficient deed of the premises. Judgment was entered accordingly.

E. H. Berm for the appellants. Defendants will not be compelled to make a contract they never made or agreed to make. (*Stoddard* v. *Hart*, 23 N. Y., 557, 562, 563; *Botsford* v. *McLean*, 45 Barb., 482; *Kent* v. *Manchester*, 29 id., 597, 598.) There can be no estoppel *in pais* in behalf of one having full knowledge of all the facts. (*Brewster* v. *Striker*, 2 N. Y., 19; *Striker* v. *Mott*, 28 id., 82; *Baker* v. *Union Mut. Ins. Co.*, 43 id., 283, 289; *Crawford* v. *Lockwood*, 9 How., 550.) Standing by and suffering a third person to make improvements on one's land does not divest the owner of title nor create an estoppel. (*Christianson* v. *Linford*, 3 Robt., 215; *Miller* v. *Platt*, 5 Duer, 273; *Swick* v. *Sears*, 1 Hill, 17; *Babcock* v. *Utter*, 32 How., 450; 1 Keyes, 407.) The

court erred in receiving declarations of third persons, not parties to the action, as proper evidence to prove an estoppel. (*Lounsbury* v. *Depew*, 28 Barb., 47, 48, 49; *Reynolds* v. *Lounsbury*, 6 Hill, 534; *Pennel* v. *Hinman*, 7 Barb., 644; *Carpenter* v. *Stilwell*, 11 N. Y., 73, 74; *Jones* v. *Hurlburt*, 39 id., 403, 406; *Lewis* v. *Woodworth*, 2 Comst., 512; *Christianson* v. *Linford*, 3 Robt., 215.)

David B. Prosser for the respondent. Verbal authority to Lewis to enter into an agreement for the sale of the premises was sufficient. (*Wharton* v. *McMahon*, 10 Paige Ch. R., 386; *Chapman* v. *Parrish*, 11 id., 405; *Newton* v. *Bronson*, 15 N. Y., 587.) Defendants not asserting any right or interfering in any way with plaintiff's improvements, are in equity estopped from asserting any claim now or from denying Lewis' authority. (1 Story's Eq. Jurisp., §§ 384, 387; *Wendell* v. *Van Rensselaer*, 1 John. Ch. R., 354; *Storrs* v. *Baker*, 6 id., 166; *Lown* v. *Needham*, 3 Paige Ch. R., 555; *Dennison* v. *Ely*, 1 Barb. Ch. R., 619; *Malin* v. *Malin*, 1 Wend., 687, 688; *Higginbotham* v. *Burnett*, 5 John. Ch. R., 188; *Wendell* v. *Van Rensselaer*, 1 id., 344.)

GROVER, J. The complaint states that John Roberts died, seized of the premises in controversy subject to certain incumbrances, leaving a last will by which he gave certain legacies to various of his children and heirs, and appointed several executors, among whom was his son Lewis Roberts, who qualified as such and entered upon the execution of the will. The will made no disposition of his real estate, or in any way charged the same with the payment of debts or legacies; nor did it confer any power upon the executors in respect thereto. Lewis Roberts, acting under the belief either that the will did confer some power of disposition upon the executors, or that the Supreme Court possessed power to authorize the executors to sell and convey the real estate in fee, employed an attorney to procure such authority from the court, who prepared and presented to the Special Term of that court a

petition praying for such authority. Upon the hearing of this petition the court made an order, authorizing Lewis Roberts to sell and convey the farm; that the appellants knew of the obtaining of this order; that the plaintiff and one Farrington, wishing to purchase a farm, and learning that the one in question was for sale, applied to Lewis Roberts to purchase it; that Lewis Roberts, with the consent and approbation of the appellants, entered into a written contract with Farrington for the sale of the farm to him; that Farrington subsequently assigned this contract to the plaintiff, to whom Lewis Roberts, pursuant to the contract, conveyed the farm; and the plaintiff, with knowledge of the appellants, went into possession and made valuable improvements. The judge found as facts, among others, that the appellants requested Lewis Roberts to act under the order of the Supreme Court, and sell the premises; and that the contract was made by Lewis with Farrington at their request; and that the appellants informed the plaintiff and Farrington that Lewis Roberts was the man to do the business, and was the authorized agent to sell the same; and that the money was paid to, and the deed given by Lewis, with their knowledge and consent. To these findings the appellants excepted. The question upon this exception is whether there was any evidence to sustain these findings. An examination of the testimony shows not only some, but almost conclusive evidence of the truth of such findings. The testimony shows that all the heirs, especially the appellants, desired to sell the farm; that they consulted together as to the price, and agreed upon a sum as satisfactory, and informed Lewis and Farrington; that each of the appellants told Farrington that Lewis was the one to do the business; that he had an order from the court authorizing him to sell, etc. Farrington and the plaintiff had a right to rely upon these assurances of the appellants so far as their interests were concerned. He had a right to presume that they knew the situation of their own title, that they were acquainted with the provisions of their father's will, and with the grounds upon which the order of the court, author-

izing Lewis to sell, was based; that they knew whether or not such order was valid. When, therefore, they assured Farrington, who was acting on behalf of the plaintiff, that they had an interest in the land, but that Lewis was authorized to sell such interest, and referred to him as the man to transact the business, and stood by while the bargain was negotiated, after they had agreed upon a price, Farrington and the plaintiff had the right, without further inquiry so far as they were concerned, to act upon the assumption of the truth of such assurances. They were under no obligation, as to them, to examine the will, the order or the papers upon which it was founded. There was nothing to excite suspicion. The plaintiff made the purchase and parted with his money in good faith. If the appellants knew that the order was invalid they were guilty of a gross fraud which would be successful unless they are estopped from disputing the assurances given by them upon which the plaintiff acted in making the purchase and parting with his money. Under these circumstances they are estopped. (*Storrs* v. *Barker*, 6 Johns. Ch., 166; *Higinbotham* v. *Burnet*, 5 Johns. Ch., 184.)

But suppose, what is more probable, that they were ignorant of the invalidity of the order of the court, and really believed that it conferred power upon Lewis to sell and convey their interest in the land; this will not aid the appellants. We have already seen that the plaintiff had the right to assume that they were acquainted with their own title, and with the extent of the authority of Lewis to dispose of their interest in the land, and to act upon such assumption. (See *Storrs* v. *Barker*, *supra*.)

The counsel for the appellants insists that a party is not estopped by his assurances as to the law. But the assurances of the appellants were not confined to this. Their correctness depended much more upon facts than upon legal conclusions. To determine whether Lewis was authorized by the order to make the sale, a knowledge of the contents of the will was necessary, and of the proceedings in procuring the order. Of these the plaintiff and Farrington

were ignorant; but the appellants were presumed to know. These might have been such as to make the order valid; and the plaintiff had the right to act upon the assurances of the appellants to this effect. After having so acted, paid his money, entered into possession, made valuable improvements with their knowledge, equity will estop them from asserting title to the land upon the ground of a want of authority in Lewis to make the sale. But this is an action by the plaintiff to compel them to execute a conveyance to the plaintiff so as to give him a valid title of record. The proof of the facts estopping the appellants from asserting title depends upon the testimony of witnesses which may be lost by their death. Under such circumstances an action in equity will be sustained to remove the cloud from and perfect and quiet the title. (*Wood* v. *Seely*, 32 N. Y., 105.)

The counsel for the appellants cites *Brewster* v. *Striker* (2 N. Y., 19). By the construction given to the will in this case it was held that the legal estate was vested in the executors during the life of the grandchildren of the testator. It followed that a judgment against one of them created no lien upon any portion of the lands, judgments being liens only upon the legal estate; and that a purchaser at a sale upon such judgment acquired no title. The fact that partition had been made between the grandchildren, and that the judgment debtor had for some time occupied the position assigned to him, had no effect upon the legal title. *Striker* v. *Mott* (28 N. Y., 82) was a case arising upon the same will. It was held that the estates of each third were limited as follows: To the trustees during the life of the grandchild, for whose benefit the same was devised; remainder to the issue of that grandchild, if any; but in case of the death of such grandchild, leaving no issue surviving, remainder to the surviving grandchildren and the issue of such as had died leaving issue. Partition was made between the grandchildren and releases executed by them, so as to make the same valid in case the grandchildren had seizin of the land. *Held*, that the grandchildren had no

Statement of case.

legal estate, and, consequently, that nothing was acquired by such releases; and, further, that a grandchild, dying without issue, having no estate, could devise none by will.

It is obvious that these cases have no analogy to the present. The conversations between Farrington and Lewis Roberts were not competent to prove the authority of Lewis to sell, but merely to show by what authority he assumed to act, and the kind of title he proposed to convey. They were not received, so far as appears, for any other purpose. The declarations of the appellants, made after the contract was entered into, were competent to show their knowledge of and participation in negotiating the contract. It is immaterial whether these declarations were communicated to Farrington or the plaintiff. If not communicated to and acted upon by him no estoppel could be based thereon. The evidence proved that Cyrus Roberts knew of the making of the improvements, and tended to show that Gilbert did.

The judgment appealed from must be affirmed, with costs.

All concur, except ALLEN, J., dissenting, and FOLGER, J., not sitting.

Judgment affirmed, with costs.

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HAMILTON PERKINS, Appellant, *v.* WILLIAM GILES et al., Respondents.

Where no charge of corruption or bad faith in the arbitrators is made, mere errors of judgment are no grounds for setting aside an award, and neither party will be allowed to prove for that purpose that the arbitrators decided wrong as to the law or the facts.

An award that is sufficiently certain to be obligatory as a contract is valid.

(Argued June 7, 1872; decided November 12, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the seventh judicial district, affirming a judgment of Special Term entered upon an order dismissing plaintiff's complaint. The action was to vacate and set aside an award.

Statement of case.

The case is reported below, 53 Barb., 342. The facts pertinent to the questions here discussed are sufficiently set forth in the opinion.

James R. Cox for the appellant. An award, to be valid, must be certain and final. (Kyd on Awards, 124, 128, 194, 196, 197; Caldwell on Arb., 243; *Schuyler* v. *Vanderwater*, 2 Caines, 235; *Pope* v. *Brett*, 2 Saund., 292; *Bedan* v. *Clarkson*, 1 Ld. Raym., 124; *Brown* v. *Hankerson*, 3 Cow., 72, and cases cited; Watson's Arbit. and Aw., 104, *et seq.*; *Lyle* v. *Rogers*, 3 Wheat., 407; *Waite* v. *Barry*, 12 Wend., 380; *Purdy* v. *Delavan*, 1 Caines, 315.) Where the good and bad parts of the award relate to the different parties, and the bad part enters into the consideration of the whole, the whole award must fail. (*Nichols* v. *Ins. Co.*, 22 Wend., 129; *Jackson* v. *Amble*, 14 John., 108; *Ott* v. *Schroeppel*, 1 Seld., 486; S. C., 7 Barb., 431; Kyd on Awards, 247; *Carnochan* v. *Christie*, 11 Wheat., 466; *Bargrave* v. *Atkins*, 3 Lev., 413; *Butler* v. *New York*, 1 Hill, 494–497; reversed, 7 Hill, 329; 1 Barb., 327.) It must dispose of all the matters submitted. (*Ott* v. *Schroeppel*, 7 Barb., 431, and cases; S. C., 1 Seld., 482; Caldwell on Arb., 276, note 1; *Waite* v. *Barry*, 12 Wend., 380; *Pejepscott Case*, 7 Mass., 399; *Brown* v. *Hankerson*, 3 Cow., 70; *Warfield* v. *Holbrook*, 20 Pick., 531; *Robson* v. *Ralston*, 1 Barn. & Adol., 723; *Samuel* v. *Cooper*, 2 Adol. & Ellis, 752; *Briggs* v. *Smith*, 20 Barb., 411; *Commonwealth* v. *Pejepscott*, 7 Mass., 420; *Carnochan* v. *Christie*, 11 Wheat., 466.) This rule is invariable when the particular matters submitted are specified in the submission. (*Wright* v. *Wright*, 5 Cow., 199; *Bean* v. *Farmer*, 6 Pick., 274; *Mitchell* v. *Stavely*, 16 East., 58; *Standish* v. *Parker*, 2 Pick., 22, note 3; *Bridge* v. *Gray*, 14 Pick., 55; *Bixby* v. *Whitney*, 5 Greenl., 192; *Barlow* v. *Todd*, 3 John., 368; *Rider* v. *Fisher*, 3 Bing. [N. C.], 874.)

D. Wright for the respondents. The finding of the arbitrator is final. (*Van Courtland* v. *Underhill*, 2 J. C. R., 339;

S. C., 17 J. R., 204.) It was not required that the items of damages allowed to either party should be stated. (*Backus* v. *Fobes*, 20 N. Y., 204.) The parties must submit to the arbitrator's award if it is made in good faith. (*Lowenstein* v. *McIntosh*, 37 Barb., 257.) An award is not impeachable for error merely. (*Backus* v. *Fobes*, 20 N. Y., 209; *Winship* v. *Jewett*, 1 Barb. Ch., 194; *Jackson* v. *Amber*, 14 J. R., 105; *Mitchell* v. *Bush*, 7 Con. Rep., 185.)

PECKHAM, J. This action seeks to set aside an award made between these parties.

The pleadings show that the plaintiff owned a saw-mill upon a stream, and the defendants a grist-mill below; that there was, at different times, a scarcity of water for the mills, arising not only from the small size of the stream but from the pond being filled up with foreign matters. Hence, many controversies arose and lawsuits were instituted, and two at least were pending between these parties when the submission was executed upon which the award was made.

The rights of the parties, so far as involved in this suit, are contained in the deed from Ezra Cuyendall, who formerly owned both mills, conveying the grist-mill to one Mosher, dated in 1839, and in the submission and the award thereon. All parties claim from the same original title. After the grant in the deed of the premises to Mosher, the privilege is granted to him and his heirs and assigns of using, maintaining and keeping in repair said mill-dam and having other privileges. Afterward it is provided as follows: "The said party of the second part (Mosher) to keep always and at all times hereafter the aforesaid dam and race-way in good repair, and of sufficient height to secure the water as high as it has heretofore been usually kept, inevitable accidents excepted, with the appurtenances," etc. The grantor reserved the surplus water, over and above what was necessary for the machinery of the grist-mill.

The submission recites the controversies at length, and they are very comprehensive. The prominent ground of

complaint on the part of plaintiff was that defendants had permitted the dam, reservoirs and race-way to become filled up with sediment, which it was their duty to remove, so that only a small portion of the waters of the stream were available for the use of the mills.

There is no allegation in the complaint that the award exceeded the submission.

It does charge that "it is partial and unjust," because, in substance, it fails to agree with the plaintiff's view of the rights of the parties as to the matters submitted to him. This, ordinarily, is no ground for charging partiality and injustice in the award. The mere fact of its submission usually implies that there is difficulty and doubt; and in this instance it is not clear that the view of the arbitrator is not correct as to the rights and duties of the parties under the deed from the defendants' original grantor. Removal of the sediment from the dam was left unprovided for therein; the covenant not in terms embracing it. The covenant is "to keep always the aforesaid dam and race-way in good repair, and of sufficient height to secure the water as high" as heretofore. Not a word is contained as to keeping the pond free from sediment, or to keep it bottomed out; but only that there shall be no fault in the "race-way" or in the "dam." If plaintiff's right to the removal of the sediment may be regarded as doubtful, under the deed, or even if it were well founded, then the award afforded no ground for this charge. (*Winship* v. *Jewett*, 1 Barb. Ch., 173.) Plaintiff avers that defendants' predecessors in occupancy had always removed this sediment. But he bases and can base no right thereon. He does not even aver that defendants knew of that practice, much less agreed to continue it.

No charge of corruption or bad faith in the arbitrator being made, mere errors of judgment are no ground for setting aside an award. (Id.)

In such case neither party will be allowed to prove that the arbitrators decided wrong as to the law or the facts of the case. (Id.; *Jackson* v. *Ambler*, 14 J. R., 96.)

It is not denied that, under a charge against the arbitrators of fraud or corruption, plain and gross error in their award would be admissible evidence of such charge; but the error should be very plain and palpable to afford any evidence of corruption. (*Wood* v. *Aub. and Roch. R. R. Co.*, 8 N. Y., 160.)

There are, then, two answers to this point. First, there is no charge of corruption against the arbitrators in making this award; and, second, if there were, the facts alleged, as its foundation, are entirely inadequate to sustain such a charge.

The complaint further states that the award is inconsistent in "that, while it holds it to have been the clear duty of defendants to keep said dam, reservoirs and race-way in good order, and recognizes their total neglect of said duty, it holds said neglect to be an inevitable accident, and charges the plaintiff with one-third part of the expense of doing the clear duty of defendants," and imposes upon the plaintiff damages and costs.

The plaintiff is mistaken in this charge, in point of fact. The award denies expressly that it was the duty of the defendants to bottom out the pond or clear it of sediment. It says: "The probability or possibility of the pond, race or reservoirs being filled up with sediment did not, it is evident, enter into the minds of the original parties to these rights." This is doubtless true.

Hence, of course, its removal was not provided for. The arbitrator states and adjudges, what he regards as the limits of the obligations of defendants under the deed, as follows: "To keep in good repair, and at a proper height and width, the mill-dam and the banks of the race-way through their entire length, including all breast-work, timber, boards, gates and barriers that are required to regulate the stream at the dam."

This, it would seem, is a liberal interpretation of the covenant, "to keep said dam and race-way in good repair and of sufficient height."

After having done this the award next adjudges and declares

what are now the duties of the parties as to clearing out the pond, etc. As that duty was not provided for, in the opinion of the arbitrator, in the deed by any covenant, the arbitrator, pursuant to his authority in the submission to pass upon and determine, among other things, "the duties of the respective parties in regard to the further use of said water power, the keeping in repair," etc., "and by whom the same shall be done," did "determine" this "duty" and devolved it upon the defendants; and as they had the greater interest in keeping the pond free from sediment, he properly charged them with two-thirds of the expense of discharging this duty.

The complaint next alleges that the award is void for uncertainty. He insists that "it fails to mention the reservoir or to require defendants to clear out the pond to any particular depth or width, or to do anything, or to do it at or within any particular time, or to expend any particular sum of money or amount of labor, or to produce any particular effect."

"That it requires the plaintiff to pay one-third of an indefinite sum without saying when."

In none of these respects is the award defective. The "reservoir" is not mentioned in the covenant in the deed, but it is clearly included in the award. The counsel seemed to rely chiefly, in his argument, upon this point of uncertainty. It will be, therefore, noticed more at length. The award declares that "defendants shall so clear out the pond, etc., as to enable both parties to have the full benefit of the water of the stream without undue obstruction, and not to allow the pond, race or reservoir so to fill up and diminish in size as to impair the value of the stream."

The parties are thus secured against obstruction of the stream, and against any diminution thereof so as to impair its value. In other words, they are secured the full benefit of the stream, without obstruction.

The duty is continuous—operative at all times upon the defendants.

What is the uncertainty complained of? It is that the

award "fails to require the defendants to clear out the dam to any particular depth or width, * * * or to do anything, or to do it at or within any particular time, or to expend any particular sum of money or amount of labor, or produce any effect in respect to clearing out the race-way, etc., or restoring or repairing the same."

There is no error in the award in any of these respects.

1st. It was not within the intention of the parties that the arbitrator should have declared the depth or width of the dam, which the defendants should clear out; how deep or how wide. The plaintiff avers that he proved before the arbitrator various things which he ought to have found accordingly. But he does not claim that he proved, or attempted to prove, how deep or how wide the pond should be cleared out, or that it was a matter susceptible of proof. It might vary in different years. The same may be said of most of the other objections.

But "the effect to be produced" is plainly provided for, so that no man who wishes to learn can fail to understand. The effect, too, is to continue, under all circumstances, so as to secure "the full benefit of the stream" to the plaintiff.

It was utterly impossible for the arbitrator to determine how much money or labor should be expended to attain this result. It would, of course, vary in different years.

To declare, therefore, that a given amount of money or labor should be expended each year, whether required or not, would clearly not have been wise in the arbitrator, and could not have been expected or desired by either party.

The effect to be attained is plainly declared, as well as the persons upon whom the burden rests of accomplishing it. If there be any defect anywhere, either in the dam, the race, the reservoir or in the pond, upon the defendants is cast the entire burden of removing it, forever; all to be done at the defendants' expense, except they are to be reimbursed to the extent of one-third for removing the mud, etc., in the pond. I do not see that the plaintiff has any cause of complaint in this award.

Plaintiff also complains that the award requires him to pay one-third of this "clearing out," which it calls "an indefinite sum, without stating when or giving any means of ascertaining the amount, or whether such payment is to be made before or after such clearing out is to be done."

The remarks already made seem to afford an answer to this objection.

The plaintiff is required to pay "one-third of the expense thus incurred in removing the mud," etc.

It is plain that he is not to pay till the work is done, as it is for "the expense *thus incurred*" he is to pay.

The amount to be paid is as easily ascertained after the work is done as any other ordinary transaction in life. That is certain which can be made certain.

In fact, this is the ordinary provision of a contract or a statute. The Revised Statutes provide for payment to an adjoining landowner of one-half of the expense of building a division fence in certain cases. The provision must be void according to the plaintiff's view.

The great difficulty between these parties, no doubt, was the question as to the liability to keep the pond cleared out. That has now been settled.

The certainty required in awards has long been determined.

Certainty, to a common intent, is sufficient; and that is to be considered, also, in reference to the nature of the transaction adjudged. This was so declared a century since. (*Lingood* v. *Eade*, 2 Atk., 501; *Jackson* v. *Ambler*, 14 J. R., 96.)

When Lord Ch. HARDWICKE delivered the opinion in *Lingood* v. *Eade* it was difficult to sustain an award in the courts, no matter how carefully made. But the rule in their construction has since greatly changed. They are now favored in law. Presumptions are made to sustain them. Courts of equity enforce them like any other contract of the parties, when it is necessary to resort to such courts. They correct mere mistakes in awards, not of a judicial nature, and then enforce them. (*Bouck* v. *Wilber*, 4 J. C., 405.) In that case there was a dispute submitted in regard to fifty acres of land and

Statement of case.

its value. The arbitrators made a mistake in describing the land; the description, as made, embracing only about one acre of the land, but they appraised the value of the whole, and in all other respects fulfilled their duty. The court ordered the description corrected and then enforced the award.

An award that is sufficiently certain to be obligatory as a contract is, I think, valid as an award. (*Akely* v. *Akely*, 16 Vt., 450.)

The cases referred to by the appellant's counsel do not sustain his position here as to uncertainty. They are all cases where the uncertainty is apparent upon the face of the award, and there is nothing referred to in the award whereby it could be made certain.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

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MARY A. HINES, Respondent, *v.* THE CITY OF LOCKPORT, Appellant.

Where the power is conferred upon public officers or a municipal corporation to make improvements, such as streets and sewers, and keep them in repair, the duty to make them is *quasi* judicial or discretionary, and for a failure to exercise the power or an erroneous estimate of the public needs, no civil action can be maintained. But when the discretion has been exercised and the improvement made, the duty of keeping it in repair so as to prevent its being dangerous to the public is ministerial, and for a negligent omission to perform it an action by the party injured will lie.

The absence of necessary funds and of legal means to procure them will excuse the neglect, but must be shown as a defence.

Where by the charter of a city its common council are constituted commissioners of highways, and they are authorized to use certain funds in defraying the expenses of repairing and keeping in order the streets, highways, etc., this is sufficient to cast upon the city the duty of keeping the crosswalks in safe condition which have been constructed in streets or highways under the direction of the city, and the fact that provisions are made in the charter authorizing assessments for local improvements, including such repairs, does not relieve the city from that duty.

(Submitted June 17, 1872; decided November 12, 1872.)

Statement of case.

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, reversing a judgment in favor of defendant, entered upon the report of a referee. (Reported below, 41 How. Pr., 435; 5 Lans., 16.)

This action was brought to recover damages for injuries sustained by plaintiff by falling through a defective crosswalk in one of defendant's streets.

It appeared that the crosswalk in question was built under the direction of the common council of the city; that it was at the time plaintiff was injured out of repair and in a dangerous condition, and had been so for a long time, and plainly to be seen. In passing over it in the night-time plaintiff fell through a hole in it and was seriously injured. The provisions of the charter of defendant and of the various amendments thereto, upon which its liability depended, are set forth in the opinion. The referee found that the common council of the city, under its charter, had discretionary power to direct by ordinance the crosswalks to be repaired, and to assess the expenses upon the property benefited, but could not repair otherwise, and that for the failure to exercise this discretionary power the city was not liable, and directed dismissal of complaint with costs. Judgment was entered accordingly.

James F. Fitts for the appellant. Plaintiff has by law discretionary powers relative to the making and repair of sidewalks, and in case of failure to repair, it can incur no liability for private damage therefor. (Laws 1867, chap. 824, § 1; Laws 1866, chap. 542, pp. 1162, 1163, 1164, §§ 1, 3, 5; Laws 1865, chap. 365; Laws 1868, chap. 809; *Cole* v. *Trustees of Medina*, 27 Barb., 218, General Term, 8th dist., 1858: *Peck* v. *The Village of Batavia*, 32 id., 634, General Term, 8th dist., 1860; *Hart et al.* v. *The City of Brooklyn*, 36 id., 226, General Term, 2d dist., 1862; *Herrington* v. *Village of Corning*, 51 id., 396; *Mills et al.* v. *City of Brooklyn*, 32 N. Y., 496–498; *Wilson* v. *The Mayor, etc., of N. Y.*, 1 Den., 599.)

S. W. Lockwood for the respondent. A municipal corporation is bound to keep its streets and walks in a safe condition for public use, and is liable for damages arising from a neglect to do so. (*Requa* v. *City of Rochester*, 45 N. Y., 129; *Davenport* v. *Ruckman and the Mayor of N. Y.*, 37 id., 568; *Furzee* v. *New York City*, 3 Hill, 612; *Storrs* v. *City of Utica*, 17 N. Y., 104; *Conrad* v. *The Village of Ithaca*, 16 id., 158; *Hutson* v. *Mayor, etc., New York*, 9 id., 163; *Hickok* v. *Village of Plattsburgh*, 16 id., 161; *Clark* v. *The City of Lockport*, 49 Barb., 580; *Wallace* v. *The Mayor, etc., of New York*, 2 Hilt., 440; *Rochester Lead Co.* v. *City of Rochester*, 3 Comst., 463; *Hines* v. *The City of Lockport*, 41 How., 435.) Though the language of its charter empowering it to keep its streets and walks in repair is that of permission, its nature is plainly imperative. (*Hutson* v. *Mayor, etc., of N. Y.*, 9 N. Y., 163, 168, 169; *Furzee* v. *N. Y. City*, 3 Hill, 612; *Adsit et al.* v. *Brady*, 4 id., 630; 1 Den., 601; *Wallace* v. *Mayor of N. Y.*, 2 Hilt., 440; *Davenport* v. *Ruckman*, 37 id., 573.)

RAPALLO, J. Where power is conferred on public officers or a municipal corporation to make improvements, such as streets, sewers, etc., and keep them in repair, the duty to make them is *quasi* judicial or discretionary, involving a determination as to their necessity, requisite capacity, location, etc., and for a failure to exercise this power, or an erroneous estimate of the public needs, no civil action is maintainable. (*Mills* v. *City of Brooklyn*, 32 N. Y., 489.)

But when this discretion has been exercised, and the street, sewer or other improvement has been made, the duty to keep it in repair so as to prevent it from being dangerous to the public, is ministerial, and for a negligent omission to perform this duty, an action lies by the party injured. (36 N. Y., 54; 32 id., 489; 1 Den., 595; 9 N. Y., 169; 45 id., 129; 46 id., 194; 37 id., 568.)

The absence of the necessary funds and of the legal means of procuring them, will excuse the non-performance of this

duty; but it seems that such absence of means should be shown as a defence. (*Hover* v. *Barkhoof*, 44 N. Y., 113, 118; *Adsit* v. *Brady*, 4 Hill, 630, 634.)

The provision of the charter of the city of Lockport (Laws of 1865, p. 661), which empowers the common council of the city to direct the making, repairing, etc., of streets, alleys, sidewalks and crosswalks, and the provision (Laws of 1865, p. 670, as amended by Laws of 1867, p. 2071), constituting the common council commissioners of highways for said city, and authorizing them to regulate and repair the streets, alleys, highways, bridges, side and crosswalks, etc., in connection with the provisions at pages 2075 and 2076 of the Laws of 1867, and page 2007 of Laws of 1869, which authorize them to use, in defraying the expenses of repairing and keeping in order the highways, streets, etc., $2,500 of the money they are authorized to raise, and also the moneys collected by poll tax, with the power to assess inhabitants for highway labor, were, in our judgment, sufficient to cast upon the city the duty of keeping in a safe condition the crosswalk in question, which had been constructed under the direction of the city, and was laid in a highway. The provisions of the act of 1866, pages 1162, 1163, 1164, which authorize assessments for local improvements, including the repair of sidewalks and crosswalks, did not, in our opinion, relieve the city from that duty. The city is not restricted to the measures therein provided, in making necessary repairs to existing crosswalks, but has power to act directly under the other provisions of the charter. There is no finding or proof that the means placed at the disposal of the city for the purpose of highway repairs had been exhausted, nor did the referee place his judgment upon any such ground, but upon the sole ground that the power to repair was discretionary, and the city was not responsible for omitting to exercise it.

In this we think he erred. The power was imperative, and imposed upon the city the duty to exercise it, though words of command were not used. (*Hutson* v. *Mayor, etc.*, 9 N. Y., 163; *Mayor, etc.*, v. *Furze*, 3 Hill, 612.) Whether dis-

Statement of case.

cretionary or not, depends upon the nature of the power or duty, and, as has been shown, the duty of keeping highways, etc., in such repair as to be safe, is not discretionary or judicial in its nature, but ministerial.

The findings of the referee clearly show a negligent omission of this duty on the part of the city, by which the plaintiff was injured, without contributory negligence on her part, and also assess the amount of the damages she has sustained, but the referee dismissed the complaint on the ground before stated.

The order of the General Term granting a new trial must be affirmed, and as the plaintiff is consequently entitled to an absolute judgment under the stipulation on appeal, the judgment should be for the amount of damages found by the referee, with costs in this court and the court below.

All concur.

Judgment accordingly.

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JOHN CONNORS, Plaintiff in Error, *v.* THE PEOPLE OF THE STATE OF NEW YORK, Defendants in Error.

The prohibition of the Constitution of the State against compelling an accused person to be a witness against himself (Const., art. 1, § 6) may be waived by him, and is waived by his consenting to be a witness in his own behalf under the act of 1869, in relation to evidence in criminal prosecutions (chap. 678, Laws of 1869), and he thereby subjects himself to the same rules and tests applicable to other witnesses.

(Submitted May 3, 1872; decided November 12, 1872.)

ERROR to the General Term of the Supreme Court in the first judicial department, to review judgment of that court affirming judgment of the Court of General Sessions of the Peace in and for the city and county of New York, entered upon conviction under an indictment for an assault with intent to kill.

Statement of case.

The plaintiff in error was tried at the March term of the Court of General Sessions, in 1872, in the city of New York, upon an indictment for a felonious assault and battery, in stabbing one Michael Gibney with a knife, with intent to kill; the jury acquitted of the principal charge, and convicted under the indictment of an assault with a sharp and dangerous weapon, with intent to do him bodily harm, whereupon he was sentenced to be imprisoned in the State prison for the term of three years and six months.

The accused availed himself of the benefit of the act of 1869, and became a witness in his own behalf. Upon cross-examination he was asked the following question: How many times have you been arrested? His counsel objected, that the district attorney has no right, on a cross-examination, to ask the witness any questions at all, under the provisions of article 1, section 6, of the Constitution, "that no man can be compelled to be a witness against himself." Objection overruled. The question was not answered. He was then asked by the court: Were you arrested before? Objected to; objection overruled; exception. Answer: Yes, sir.

William F. Kintzing for the plaintiff in error. The court erred in compelling plaintiff in error to answer upon cross-examination. (State Const., art. 1, § 6; *People* v. *Hackley*, 24 N. Y., 74; *People* v. *Goodwin*, 18 J., 202; *People* v. *Mather*, 4 Wend., 229.) The questions asked were as to new matters, and he became a witness for the people. (*Carpenter* v. *Ward*, 30 N. Y., 243; *Newcomb* v. *Griswold*, 24 id., 299; *Lawrence* v. *Baker*, 5 Wend., 301; *Harris* v. *Nelson*, 7 id., 57; *Howard* v. *City Fire Ins. Co.*, 4 Denio, 50; *Stephens* v. *The People*, 19 N. Y., 572.

John R. Fellows for the defendants in error. Plaintiff in error having offered himself as a witness, was subject to the same rules as other witnesses. (*Brandon* v. *People*, 42 N. Y., 265; *Ruloff* v. *People*, 45 id., 213, 221; *McGary* v. *People*, 2 Lansing, 227; 35 Cal., 96; *People* v *Reinhart*, 39 id., 449; *Hackley* v. *People*, 24 N. Y., 75, 81, 82.)

Opinion of the Court, per CHURCH, Ch. J.

CHURCH, Ch. J. The question is presented whether a prisoner who is sworn as a witness at his own request can be compelled to answer questions upon his cross-examination, as to facts affecting his credibility, in relation to which he was not questioned on his direct examination.

The question objected to was, "How many times have you been arrested?" It was within the discretion of the court to allow such a question to a witness. It was not claimed to be privileged, but it was objected that the witness was protected from answering it by the constitutional provision "that no person shall be compelled in any criminal case to be a witness against himself." We think the decision of this court in *Brandon* v. *The People* (42 N. Y., 265), should be controlling upon this point.

The question was substantially the same, and although the objection was put upon a different ground, yet the decision was placed upon a principle which disposes of this case. That principle was, that by consenting to be a witness in his own behalf under the statute of 1869 the accused subjected himself to the same rules and was called upon to submit to the same tests which could by law be applied to the other witnesses; in other words, if he availed himself of the privilege of the act, he assumed the burdens necessarily incident to the position. The prohibition in the Constitution is against compelling an accused person to become a witness against himself. If he consents to become a witness in the case voluntarily, and without any compulsion, it would seem to follow that he occupies for the time being the position of a witness with all its rights and privileges, and subject to all its duties and obligations. If he gives evidence, which bears against himself, it results from his voluntary act of becoming a witness, and not from compulsion. His own act is the primary cause, and if that was voluntary, he has no reason to complain.

The point was not made that the whole act of 1869 was unconstitutional, and we are not therefore called upon to decide it, and we disclaim an intention to intimate an opinion in relation to it.

Statement of case.

The act is not regarded with much favor by the bench, bar or the people, and whether by its terms it evades the constitutional provision, or in substance and practical effect violates it, is a question which will be considered when it is presented. (*Ruloff's Case*, 45 N. Y., 213.) We think the rule against being a witness is one which may be waived by an accused person and that it does not come within the principle upon which the *Cancemi Case* (18 N. Y., 128) was determined. In order to present the constitutional question, a distinct ruling and exception are requisite.

The judgment must be affirmed.

All concur.

Judgment affirmed.

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130 218

CAROLINE FRIED, Respondent, *v.* THE ROYAL INSURANCE COMPANY, Appellant.

By the terms of a contract made by plaintiff with defendant's agent; in consideration of the payment of the premium upon a proposal for insurance upon the life of her husband, it was agreed that the proposal should be forwarded to defendant's head office in London, and, if accepted, that a policy should be issued in accordance therewith; if declined, the premium should be returned. In case the husband died before the decision was received, the sum insured was to be paid. The proposal was forwarded and accepted and policy returned, to be executed by the agent and delivered. The agent executed it, but refused to deliver it upon the ground of an alleged unfavorable change in the health of the husband. The latter died soon after, and defendant refused to recognize the policy as binding, claiming that the contract was optional, and the acceptance qualified by standing instructions to the agent, not to deliver any policy if a change had taken place in the health of the assured.

In an action to recover the amount of the policy,—*Held*, that the contract and acceptance were unqualified and could not be limited or modified by the private instructions to the agent. That the facts being stated in the complaint, it was immaterial whether the action was to be regarded as one upon the policy, or for damages upon the contract to issue a policy; in either view, plaintiff was entitled to recover the amount insured or agreed to be insured.

(Argued June 18, 1872; decided November 12, 1872.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought upon an alleged contract of life insurance. Defendant is a foreign corporation having an office and doing business in the city of New York. Plaintiff applied to its agent there for an insurance upon the life of her husband; presented a proposal and paid the premium and received the following receipt:

"The Royal Insurance Company of Liverpool, New York Agency, 19th December, 1864.—Received from Mrs. Caroline Fried the sum of eighty 25-100 dollars, premium on a proposal of assurance for five thousand dollars on the life of her husband, Heinrich Fried, which is to be forwarded immediately to the head office at Liverpool, England, for acceptance. If it be accepted, a policy will be issued in accordance therewith; if declined, the above mentioned premium will be returned. But in case the said Heinrich Fried die before the decision of the head office shall have been received, the sum insured will be paid in accordance with my instructions.

"$80.25.

"A. B. McDONALD, *Agent.*"

The proposal was forwarded, received and accepted, and a policy of insurance issued by defendant and forwarded to the agent to be executed and delivered. The agent executed the policy, but declined delivering it; having been advised that the health of the assured had declined. When the second annual payment became due, the plaintiff tendered it to the agent who refused to accept it. On the 15th of January, 1866, the husband died. Due proof was made and furnished defendant.

W. W. McFarland for the appellant. Without mutual assent there is no contract. (*Atkinson* v. *Bell*, 8 B. & C., 272; *Simons* v. *Swift*, 5 id., 857.) No contract of insurance was ever effected by the mutual assent of the parties. (*Jack-*

Statement of case.

son v. *Galloway*, 6 Scott, 786; Pothier on Obligations, part 1, chap. 1, art. 2; *Bruce* v. *Pearson*, 3 John., 534; *Jordon* v. *Norton*, 4 Mees. & W., 155; *Hollard* v. *Eyre*, 1 S. & S., 194; *Eliason* v. *Henshaw*, 4 Wheat., 225; *Wontner* v. *Sharpe*, 4 C. B., 404, 441; *Duke* v. *Andrews*, 2 Exch., 290; *Chaplin* v. *Clark*, 4 id., 403; *Bethel* v. *Hawkins*, 21 La. Ann., 620; *U. S.* v. *Shaw*, 1 Cliff. C. C., 317; *Water Commissioners* v. *Brown*, 3 Vroom., 504; *Trevor* v. *Wood*, 36 N. Y., 307.)

Roger A. Pryor, for the respondent. The questions of fact will not be reviewed in this court. (*Austin* v. *New Jersey Co.*, 43 N. Y., 76; *Fellows* v. *Northrup*, 39 id., 117; *Brown* v. *Vreedenburgh*, 43 id., 119; *Newton* v. *Harris*, 6 id, 345; *Marco* v. *Liverpool, etc.*, 35 id., 664; *Bergin* v. *Wemple*, 30 id., 319; *Thompson* v. *Kepel*, 30 id., 383; *Kerr* v. *McGuire*, 28 id., 446; *Loeschick* v. *Baldwin*, 38 id., 326.) Any instructions confidentially communicated to their agent by the defendant were inadmissible to affect the plaintiff. (*Miller* v. *Phœnix Ins. Co.*, 27 Iowa, 203; *Commerce Co.* v. *Union Ins. Co.*, 19 How. [U. S.], 322; *Perkins* v. *Wash. Ins. Co.*, 4 Cow., 645; *Lightbody* v. *The North American Ins. Co.*, 23 Wend., 18; 2 Story on Agency, § 133; 1 Liver. on Pr. and Agent, 107.) The authority of the agent not being contested the case exhibits a clear, complete, obligatory contract of insurance. (*Miller* v. *Phœnix Ins. Co.*, 27 Iowa, 203; *Lightbody* v. *Wash. Ins. Co.*, 23 Wend., 18; Angell on Fire and Life Ins., § 33; *Sheldon* v. *Connecticut Mut. Life Ins. Co.*, 25 Conn., 207; *Collins* v. *The Insurance Co.*, 2 Big. Life and Accid. Rep., 161; *Kentucky Mut. Life Ins. Co.* v. *Jenks*, 5 Ind. R., 96; *Kennedy* v. *The N. Y. Life Ins. Co.*, 10 La. Ann., 809; *Commerce Ins. Co.* v. *Union Co.*, 19 How. [U. S.], 318; *Xenos* v. *Wickham*, 2 L. R. H. of L. Cases, 296; *Taylor* v. *Merchants' Ins. Co.*, 9 How. [U. S.], 390; *Audubon* v. *Excelsior Ins. Co.*, 27 N. Y., 216; *Palm* v. *Medina Ins. Co.*, 20 Ohio, 529; *Mactier* v. *Frith*, 6 Wend., 103; *Wheat* v. *Cross*, 31 Md., 99; *Oliver* v. *The Mutual, etc.*, 2 Curtis, C. C., 290;

Rockwell v. *The Hartford Fire Ins. Co.*, 4 Abb., 179; *Bidwell* v. *The Astor Mut. Ins. Co.*, 16 N. Y., 263; *Ide* v. *Phœnix Ins. Co*, 2 Chicago L. N., 310; *Leeds* v. *The Mechanics' Ins. Co.*, 8 N. Y., 351; *Halleck* v. *The Commercial Ins. Co.*, 2 Dutch., 268; S. C., 3 id., 645; *Whittaker* v. *Farmers' Union Ins. Co.*, 29 Barb., 312; *Perkins* v. *Washington Ins. Co.*, 4 Cowen, 654; *First Baptist Church* v. *Brooklyn, etc.*, 19 N. Y., 305; *Kelly* v. *Commonwealth Ins. Co.*, 10 Bosw., 82; *Vassar* v. *Camp*, 11 N. Y., 441; *Trevor* v. *Wood*, 36 id., 307; *Lightbody* v. *The North American Life Ins. Co.*, 23 Wend., 18.) The agent had no right to withhold the policy. (*Lightbody* v. *The North American Life Ins. Co.*, 23 Wend., 18; *Perkins* v. *The Washington Ins. Co.*, 4 Cowen, 656; *Sheldon* v. *The Connecticut Mutual Life Ins. Co.*, 5 id., 207; *Hallock* v. *Commerce Ins. Co.*, 2 Dutcher, 268; S. C., 3 id., 665.) Assuming the policy ineffectual as evidencing a contract, this judgment may be sustained on the executory agreement of December 19, 1864. (*Pratt* v. *Hudson River R. R. Co.*, 21 N. Y., 305; *Post* v. *Ætna Ins. Co.*, 43 Barb., 352; *Eureka Ins. Co.* v. *Robinson*, 56 Penn., 256; *Home Ins. Co.* v. *Favorite*, 46 Ill., 263; *Rockwell* v. *The Hartford, etc.*, 4 Abb., 179; Angel on Life and Fire Ins., §§ 31, 32.)

CHURCH, Ch. J. There is no dispute that the agent had authority to make the precise contract which he did make with the plaintiff, and the acceptance of the proposition contained in it by the defendants is conclusive of their assent to the exercise of such authority in their behalf.

The terms of the contract are too clear for construction. It contains a proposition on the part of the plaintiff for insurance of the life of her husband, for which she advanced the usual premium for one year. The defendants, by their agent, agreed that if the proposition was accepted at their head office in Liverpool, they would issue a policy in accordance therewith, but if rejected, they would return the premium. If the nominee died before the decision of the head office was

received, the sum insured was to be paid in accordance with instructions. It was a present insurance in the event of death before the decision was received, and the only contingency upon which the contract of insurance could fail, was the rejection by the head office of the proposition, and the receipt of such decision before the death of the nominee. To this extent only the assured took the risk of a failure to consummate the contract. That contingency did not happen. The defendants accepted the proposition and forwarded a policy to their agent, to be executed and delivered. It was executed by the agent, but never delivered on the ground of an alleged unfavorable change in the health of the nominee.

It is now claimed by the learned counsel for the defendants, that no contract was ever consummated; that it was entirely optional with the company whether to accept or reject, and that the acceptance must be qualified by the standing instructions from the company to the agent, the substance of which, as claimed, is not to deliver any policy if a change had taken place in the health of the assured. It is proper to observe that it is immaterial whether this is to be regarded as an action upon the policy or an action for damages upon the contract to issue a policy.

The facts are sufficiently stated in the complaint to recover on either ground under our system of practice, and I do not understand that any technical objection is made upon this point. The point insisted upon, as before stated, is that the acceptance was not absolute, but qualified by the general instructions to the agent. This position cannot be sustained for two reasons. First. The instructions constituted no part of the contract and were never brought to the notice of the assured, and, as claimed to be, are inconsistent with the terms of the contract. The contract is unqualified, that in case of acceptance by the head office, "a policy will be issued." If the alleged instructions are controlling, we must interpolate the words "unless in the mean time a change shall take place in the health of the nominee." This would be a material alteration, and one affecting the substance of the contract.

Opinion of the Court, per CHURCH, Ch. J.

The contract of insurance was to take effect from the date of the proposal. If accepted, the risk of an unfavorable change of health, after that time, was necessarily assumed by the company, Even death, before the receipt of the decision of the company, was expressly assumed by it. The assured took the risk that the application was in the prescribed form, and presented a proper subject for life insurance at that time, not that the nominee would continue in such a state of health as to be acceptable to the company for an indefinite period. The company was to act upon the papers presented, and they related to the condition of the nominee at the time they were prepared. If the papers presented showed a proper case for insurance, the risk of rejection by the company was very slight, while the risk of the health of the nominee for one, two or six months might be very serious.

In effect, there would be no insurance unless the nominee continued in good health or died, until the policy was delivered.

The alleged instructions could have no such effect upon the contract. They could not alter or qualify the terms of the contract to the prejudice of the plaintiff. If the agent made a contract in violation of or inconsistent with his instructions, the plaintiff had no notice of it, and the principal afterward ratified it.

It is argued that, having the power to accept or reject the proposal, the company might do either with qualifications. It is sufficient to answer that they did not make any qualification. The acceptance was absolute, and the supposed qualification is not binding upon the plaintiff so as to vary the terms of the agreement. It was competent for the company to make a contract in entire disregard of the instructions to their agent. They are chargeable with knowledge that this contract is inconsistent with what is now claimed to be their instructions to their agent, and with that knowledge to have assented to it, and it is too clear for argument that they cannot set up the instructions to defeat it. It is a familiar principle that private instructions to an agent will not affect third per-

sons. (4 Cow., 645; 23 Wend., 18; 2 Story on Agency, § 133.) But this is a case where the principal assented to a contract inconsistent with the instructions.

In the next place, I do not think the instructions will bear the construction claimed by the defendants' counsel. They are as follows: "No policy is to be in force, or is it to be delivered on any account whatever, until the premium be paid. If it should therefore come to your knowledge that any change shall have taken place in the health of the assured between the date of the proposal and the receipt of the policy, you will please withhold it until you have communicated with the company on the subject."

This direction not to deliver a policy applies only to cases where the premium has not been paid. In such cases, the application would be for a contract to commence at a future time. In other words, there would be no insurance, provisional or otherwise, until the premium was paid. In such a case, it would be reasonable and proper that the applicant should then be satisfactory, but to apply this direction to such a contract as this, where the premium has been paid, would be unreasonable if not absurd. It would deprive the party of any insurance until the delivery of the policy. Such a construction is repelled by the clause, that in case of the death of the party before the decision of the head office is received, the sum insured shall be paid. It cannot be supposed that the parties intended to protect the plaintiff in case of the death of the nominee before the delivery of the policy, and not to protect her in case of an unfavorable change of health.

Looking at the language of the instructions and the terms of the contract, the situation of the parties and the objects to be attained, and giving that construction to the language most unfavorable to the party using it, as we are bound to, the instructions produced in evidence have no application to this case. With those out of the case, it is not claimed but the acceptance by the company of the proposal consummated the contract.

The minds of the parties then met, and the mind of each

Statement of case.

was evidenced by an act upon which the other had a right to rely. The plaintiff said I will give you so much a year to insure my husband's life, and pay you the first year in advance, to which the defendants answered, I accept your proposal and receive your money, and I will issue a policy.

This is a binding contract within all authorities. (6 Wend., 103; 36 N. Y., 307.) Those cited by the defendants' counsel are not in conflict with these views.

Although the defendants failed to issue the policy according to their contract, yet they are liable, I think, upon the contract, as a contract of insurance, and, at all events, are clearly liable for damages for not delivering the policy.

The decision by the referee upon the disputed question of fact, whether there was fraud in the original application or not, which is conclusive upon us, fixed the liability of the defendants in this case, and the judgment must be affirmed.

All concur.

Judgment affirmed.

80	250
109	169
109	294
50	250
116	32
50	250
147	328
50	250
170	1442

THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY, Appellants and Respondents, *v.* THE PENNSYLVANIA COAL COMPANY, Appellant and Respondent.

The rule that an agreement to arbitrate is not sufficient to oust a court of law or equity of jurisdiction, is a departure from the general principle that effect should be given to contracts when lawful in themselves according to their terms and the intent of the parties, and it will not be extended or applied to new cases not coming within the letter and spirit of the decisions already made.

Where by the same agreement which creates a liability, and gives a right, it is made a condition precedent to a right of action thereon, either in express terms or by necessary implication, that certain facts shall be determined or amounts and values ascertained by arbitrators in case the parties cannot agree thereon; in case of such disagreement, and in the absence of fraud there is no cause of action, under the agreement, either at law or in equity, until the award is made as provided.

Statement of case.

(The authorities upon the question of the binding force of agreements to arbitrate, collated and discussed.)

By an agreement between the parties, upon the completion of a contemplated enlargement of plaintiff's canal, defendant covenanted to pay additional toll, the amount of which was to be arrived at by ascertaining or estimating the cost of transportation before the enlargement, and also such cost after the enlargement, and one-half of such portion of the reduction as should be estimated to have been produced solely by the enlargement should be the additional toll thereafter to be charged; and in cases of disagreement between the parties as to the amount of reduction, and the portion thereof produced by the enlargement, the same should be determined by arbitrators.

In an action to recover additional toll, and to fix the amount thereafter to be charged,—*Held*, 1st. That the right of plaintiff to demand and the obligation of defendant to pay additional toll was restricted to the rate to be established pursuant to the agreement, and, until thus ascertained and established, defendant could not be put in default and plaintiff had no cause of action. 2d. That to found a claim for additional toll it must be made to appear that the actual cost of transportation was reduced after enlargement, and as the cost before and after was capable of being and was of such a character, that it was essential it should be certainly ascertained, not conjectured, the contract required it should be so ascertained, from the best and most reliable data, and not determined by the judgments or opinions of parties or arbitrators without such data; also that the words "actual cost," meant the actual expenditure or outlay by the companies in the transportation of coal, as the business had been ordinarily conducted by them.

(Argued June 19, 1872; decided November 12, 1872.)

This case comes up on cross-appeals by the respective parties from a judgment of the General Term of the Supreme Court in the third judicial district, affirming a judgment in favor of the plaintiffs, entered upon the report of a referee.

The action was brought to recover a sum alleged to be due from the defendant for additional toll, chargeable and collectible upon coal of the defendant transported over the plaintiffs' canal, after it had been enlarged, and to fix a permanent toll, to be charged and collected upon all of the defendant's coal transported after such enlargement.

The controversy arises out of a contract made between the plaintiffs and the Wyoming Coal Association, dated August 31, 1847, the defendant having by contract assumed and become

possessed of all the rights and liabilities of the association under such contract. The provisions material to the present controversy are in substance as follows: The plaintiffs agreed to allow the association to use their canal, as it then was, for the purpose of transporting coal from where it should enter the same to tide-water, near the mouth of the Rondout creek, on the Hudson river, charging and collecting therefor a toll of so much per ton.

The amount of this toll for each year was to be fixed on the first day of May, and to be one-half of the surplus of the average selling price per ton of the coal (assuming for a standard of price the Canal Company's contracts made up to May first, for sale of their coal to arrive by canal during the year), after deducting from such selling price the fixed sum of two dollars and fifty cents per ton, which sum was assumed by both parties as the cost to the coal company of the coal laid down at tide-water.

The controversy in this case arose under the provisions which relate to the additional and permanent toll which should be chargeable and collectible in case the canal should be enlarged, and which are in the following words:

"And in case of an enlargement of the said canal, the said president, managers and company, and their successors and assigns, may also charge and collect an additional toll on the coal transported, in pursuance of this agreement, at a rate per ton of 2,240 pounds, to be established after the completion of the said enlargement, in the manner following, viz.:

"The cost of transportation per ton on the said canal, between the point at which such coal shall enter the said canal and the point on the Rondout creek at which said canal meets tide-water, after the full effect of all the improvements previous to the said enlargement shall have been experienced, shall be fairly ascertained or estimated, the cost of transportation per ton on the said canal between those points, after the said enlargement shall have been completed, shall also be fairly ascertained or estimated, and one-half of such portion of the reduction in the cost of transportation per ton on the said canal between

those points, as shall be estimated to have been produced by the said enlargement and by no other cause, shall be the additional toll per ton, to be thereafter permanently charged.

"And if the managers of the said Delaware and Hudson Canal Company and the managers of the said the Wyoming Coal Association shall not be able to agree as to the just and proper amount of reduction on the cost of transportation per ton on the said canal between the aforesaid points, and as to the portion of such reduction which shall be produced by the said enlargement, the questions between them, in respect thereto, shall be submitted to two persons, one of whom shall be chosen by the managers of the said company, and the other of whom shall be chosen by the managers of the said association. And the persons so chosen shall, if themselves unable to agree, choose a third person, to whom also the said questions shall be submitted, and the decision made in writing and signed by those assenting thereto of the two persons first chosen, if they shall agree; and if not, of a majority of the three persons chosen as aforesaid shall be final and obligatory on the parties hereto as to the question aforesaid."

The canal was afterward enlarged so as to admit the transit of boats carrying 125 tons, which was seventy-five tons more than the boats carried on the old canal. Having completed the enlargement the plaintiffs gave notice thereof to the defendant by letter dated 28th July, 1853, wherein they claimed that the enlargement had produced a saving in the cost of transportation of forty cents a ton; and that, under the contract, they had a right to charge and collect twenty cents per ton as additional toll; defendant claimed there was no deduction.

A lengthy correspondence thereupon ensued in reference to an arbitration by which it appears that, although arbitrators were chosen, yet they never had a meeting nor was there a submission of the matters to them.

The referee decided that the determination by arbitrators, in case the parties did not agree as provided for by the contract, was not, nor was the fixing the amount of the reduction,

either by concurrence of the parties or award of the parties, a condition precedent to plaintiffs' right to exact a payment of or to sue for such additional tolls. That the sums of freight actually paid by the Delaware and Hudson Canal Company, before and after the enlargement, did not furnish a proper standard for ascertaining or determining the actual cost of transportation. That the proper method was to determine, in respect to each period, the amount of a fair and reasonable freight, such as should be paid to the boatmen if they supplied the boat horses and crew; and a proper method of ascertaining such fair and reasonable freight was by inquiring into and determining, upon the evidence, the aggregate cost for the year or season of a boat, such as was used upon the canal prior to the enlargement, and one of a species used after the enlargement and adopted by the referee for the purposes of the estimate, embracing a proper allowance for the use and depreciation of the boat, the cost of wages and board of the necessary crew, the use and keep of the horses, and all other items which go to make up the cost of transportation, and then inquiring into and determining the number of trips each would make under ordinary circumstances, what quantity of coal each would carry, and to divide the aggregate expense by the number of tons each would carry during the season, and thus fix the cost per ton. Upon these bases, without allowing to plaintiffs the benefit by way of increase of toll, of the general advance of prices of material and labor after the enlargement, to which he held the plaintiffs not entitled, the referee found the reduction to be ten cents per ton. He therefore fixed the amount of additional toll, to which plaintiffs were entitled, at five cents per ton. He further found that the reduction, applying the same measure of prices after the enlargement as before, was fifteen and thirty-nine one hundredths cents per ton; and if plaintiffs were entitled to have the reduction thus estimated, that the additional toll should be seven and sixty-nine one hundredths cents per ton.

It appeared upon the trial that the business of coal transportation upon the canal had always been done by

Statement of case.

employing boatmen who purchased their boats of the companies, paying by installments reserved out of each trip. Each boatman run his boat, paying all expenses and carried coal at a freight of so much per ton. It also appeared that the sum paid per ton, after the enlargement, was in fact more than before.

Plaintiffs appealed from so much of the judgment as omitted to allow them the amount of additional toll resulting from the rise in prices. Defendant appealed from the whole judgment.

Amasa J. Parker, *John H. Reynolds* and *Stephen P. Nash* for the plaintiffs. Plaintiffs are entitled to maintain this action and to have the reduction in the cost of transportation determined by this court instead of by arbitration. (*Kill* v. *Hollister*, 1 Wils., 129; *Thompson* v. *Charnock*, 8 Term., 139; *Scott* v. *Avery*, 4 House of Lords Cases, 811; *Horton* v. *Sayer*, 4 Hurls. & Norman, 642; *Smith* v. *Compton*, 20 Barb., 262; *Gray* v. *Wilson*, 4 Watts, 39; *Haggart* v. *Morgan*, 1 Seld., 422; *Greason* v. *Keteltas*, 17 N. Y., 491.) The clause in reference to arbitration does not fall within the cases where it is held to be a condition precedent. (*Buller* v. *Tucker*, 24 Wend., 477; *Smith* v. *Brady*, 17 N. Y., 173; *McMahon* v. *Erie R. R. Co.*, 20 id., 463; *Smith* v. *Deiggs*, 3 Denio, 73; *Thurtell* v. *Balbirnie*, 2 Mees. & Welsb., 786; *Scott* v. *Avery*, 5 House of Lords Cases, 811; the same case being reported also in 20 E. L. & E., 327; 8 Ech., 487, 497; 22 Law Jour. [N. S.], 187; 17 Jurist., 916; referee's opinion, fol. 936.) Even if there was a submission it was revocable. (*Smith* v. *Crompton*, 20 Barb., 262; *Peters* v. *Craig*, 6 Dana [Ky.], 307.) The contract does not prescribe the form of remedy for collecting the toll, nor forbid a resort to an action. (*Jordan* v. *Morley*, 23 N. Y., 552; *Penn. Coal Co.* v. *Del. and Hud. Canal Co.*, 1 Keyes, 79; *Howell* v. *Young*, 5 B. & C., 258; *Wilcox* v. *Plumer*, 4 Peters, 172, 182; *Angel* v. *Bryant*, 1 Sandf. [S. C.], 78; 11 Ad. & El., 301; 18 Vermont, 252; Sedgwick on Damages, 102, 103, 109.) Plaintiffs are not estopped from proving the cost

of transportation on the old canal as more than found by the referee. (*Dezell* v. *Odell*, 3 Hill, 222.) In the construction of a contract, preliminary negotiations are merged in the ultimate contract. (*Renard* v. *Sampson*, 2 Duer, 285; affirmed, 2 Kern., 561; *Whitbeck* v. *Waine*, 16 N. Y., 532; *Matter of Bonaffe*, 23 id., 169, 185.) In construing an ambiguous contract, the acts of the parties under it, and the circumstances under which it was made, are sometimes received in evidence. (*Curtiss* v. *Howell*, 39 N. Y., 211; *French* v. *Carhart*, 1 Comst., 96; *Railroad Co.* v. *Trimble*, 10 Wall., 367.) Any agreement which has for its object to oust the courts of their jurisdiction over the rights of parties, is void. (*Hurst* v. *Litchfield*, 39 N. Y., 377; *Greason* v. *Keteltas*, 17 N. Y., 491; *Scott* v. *Avery*, 5 H. L. Cas., 811; 36 Eng. L. & Eq., 1; *Scott* v. *Corp. of Liverpool*, 3 De G. & J., 334.) Defendant was liable to pay the further toll as soon as the enlargement was completed. (*The Jordan, etc., Co.* v. *Morley*, 23 N. Y., 552; *Penn. Coal Co.* v. *Del. and Hud. Canal Co.*, 1 Keyes, 72, 79.)

Charles F. Southmayd and *Lyman Tremain* for the defendant. The principle that an agreement to arbitrate is a bar to an action is not applicable to this case. (*Smith* v. *Brady*, 17 N. Y., 173; *McMahon* v. *N. Y. and Erie R. R. Co.*, 20 id., 463; *Smith* v. *Briggs*, 3 Denio, 73; *United States* v. *Robson*, 9 Peters, 309; *Butler* v. *Tucker*, 24 Wend., 447; *Scott* v. *Avery*, 5 House of Lords Cas., 811; *Brown* v. *Overbury*, 11 Exch. R., 715; *Milnes* v. *Gery*, 14 Ves., 400; *Thurnell* v. *Balberino*, 2 Mees. & Welsb., 786; *Scott* v. *Corporation of Liverpool*, 3 De Gex & Jones, 334; 2 Story's Eq. Jur., § 1457 *a*.) A submission of a pending suit to arbitration is a defence, and suspends the right of action. (*Camp* v. *Root*, 18 Johns., 22; *Ex parte Wright*, 6 Cowen, 399; *People* v. *Onondaga*, C. P., 1 Wend., 314; 2 id., 505; *Town* v. *Wilcox*, 12 id., 503; *Green* v. *Patchin*, 13 id., 293; *Wells* v. *Lain*, 15 id., 99; *Dedrick's Adm'r* v. *Richley*, 19 id., 108; *Coleman* v. *Wade*, 2 Selden, 44, 49; *Webb* v. *Rice*,

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1 Hill, 610; *Blunt* v. *Whitney*, 3 Sandf., 4; *Jordan* v. *Hyatt*, 3 Barb., 275; *Ressequie* v. *Brownson*, 4 id., 541; *Smith* v. *Compton*, 20 id., 262; *Grosvenor* v. *Hunt*, 11 How., 355; *Bank* v. *Wednor*, 11 Paige, 529, 533; *Brazill* v. *Isham*, 2 Kern., 9; *James* v. *Patten*, 6 N. Y., 9.) The commencement of this suit is no revocation of the submission. (*Van Antwerp* v. *Stewart*, 8 I. R., 125; *Lattey v. Tyrill*, 10 Vt., 91; Caldwell on Arbitration, 70.) No particular form of words is necessary to make a submission complete, and an agreement to abide by the award is implied in the submission. (*Stuart* v. *Cox*, 16 Vt., 633; 2 Porter Ch., 430; *Harrison* v. *Wright*, 13 Mason, 816.) An express covenant in a deed takes away all implied covenants, and in such case there can be no resort to an implied contract. (*Loomis* v. *Hall*, 15 Pick., 169; *Zule* v. *Zule*, 24 Wisc., 76; *Vanauken* v. *Vanauken*, 11 Johns. Ch., 122; *Gates* v. *Caldwell*, 7 Mass., 68; *Sumner* v. *Williams*, 8 id., 201.) A contract cannot rest partly in writing and partly in parol. (*Parkhurst* v. *Van Cortlandt*, 1 Johns. Ch., 273; *Norton* v. *Woodruff*, 2 Comst., 153.) The ascertainment of the amount of the defendant's liability by arbitration is a condition precedent of the defendant's obligation of payment. (*Horton* v. *Sayer*, 4 Hurlst. & Nor., 642, op. p. 651; *Scott* v. *Avery*, 5 H. of L. Cas., 811, opinion Ld. Chan. CRANWORTH; *Milnes* v. *Gery*, 14 Ves., 140, opinion of Master of the Rolls; Story's Eq. Jur., § 29, pp. 261, 716, 717; Williard's Eq. Jur., 490; *Brown* v. *Smith*, 10 Paige, 200; *Walrath* v. *Handy*, 24 How., 353; Code, § 148; *Hatch* v. *Cook*, 4 J. Ch. R., 559; *Kempshall* v. *Stone*, 5 id., 193; *Morse* v. *Elmandorf*, 11 Paige, 277; *Lynch* v. *Williard*, 6 J. Ch. R., 342.) Plaintiffs could only be relieved from the performance of such condition precedent by absolute refusal to proceed with the arbitration, or such misconduct as would amount to a fraudulent evasion of it on the part of defendant. (*Scott* v. *Corporation of Liverpool*, 3 De Gex & Jones, 334; 2 Story's Eq. Jur., § 1457 *a*.) The referee's finding as to cost of transportation is contrary to the evidence, and is error of law. (*Putnam* v.

Hubbell, 42 N. Y., 106; *Austin* v. *N. J. Steamboat Co.*, 43 id., 75.)

ALLEN, J. It appears to be well settled by authority that an agreement to refer all matters of difference or dispute that may arise to arbitration, will not oust a court of law or equity of jurisdiction. The reason of the rule is by some traced to the jealousy of the courts, and a desire to repress all attempts to encroach on the exclusiveness of their jurisdiction; and by others to an aversion of the courts, from reasons of public policy, to sanction contracts by which the protection which the law affords the individual citizens is renounced. An agreement of this character induced by fraud, or overreaching, or entered into unadvisedly through ignorance, folly or undue pressure, might well be refused a specific performance, or disregarded when set up as a defence to an action.

But when the parties stand upon an equal footing, and intelligently and deliberately, in making their executory contracts, provide for an amicable adjustment of any difference that may arise, either by arbitration or otherwise, it is not easy to assign at this day any good reason why the contract should not stand, and the parties made to abide by it, and the judgment of the tribunal of their choice. Were the question *res nova*, I apprehend that a party would not now be permitted, in the absence of fraud or some peculiar circumstances entitling him to relief, to repudiate his agreement to submit to arbitration, and seek a remedy at law, when his adversary had not refused to arbitrate, or in any way obstructed or hindered the arbitration agreed upon. But the rule that a general covenant to submit any differences that may arise in the performance of a contract, or under an executory agreement, is a nullity, is too well established to be now questioned; and the decision of the appeal of the present defendant does not make it necessary to inquire into the reasons of the rule, or question its existence. The better way, doubtless, is to give effect to contracts, when lawful in them-

selves, according to their terms and the intent of the parties; and any departure from this principle is an anomaly in the law, not to be extended or applied to new cases unless they come within the letter and spirit of the decisions already made. The tendency of the more recent decisions is to narrow rather than enlarge the operation and effect of prior decisions, limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences, without a resort to courts of law; and the rule is essentially modified and qualified.

The agreement, which is the subject-matter of litigation in this action, was carefully prepared by astute counsel, and the contracting parties themselves were intelligent, shrewd and practical business men of large experience; and no injustice, therefore, will be done to either by interpreting the instrument, and every part of it, by the ordinary rules for the interpretation of written instruments. It may be assumed that every provision which was essential to protect the interests of either, and give effect to the actual intention of both was inserted in words well chosen to give clear and distinct expression to the views of the parties, and exclude every construction inconsistent with such intention or the agreement as actually made.

The plaintiffs, under the agreement, secured to themselves the right to certain tolls absolutely for the use of their canal, to be ascertained from year to year in the manner and by the rules prescribed. Although they were not fixed and certain in amount, they were capable of being ascertained and made certain. An enlargement of the canal was contemplated, which it was supposed would inure to the benefit of the defendant by reducing the actual cost of transportation, and entitle the plaintiffs, under the arrangement and the terms of the agreement, to additional toll. But the amount of the toll to which the plaintiffs should be entitled, in addition to the toll as agreed upon, could not then be determined; and hence a provision was necessary for the ascertainment and adjustment of this additional toll when the right to it should

accrue. The parts of the agreement relating to this additional toll are separate and independent of every other part of the instrument, and are complete and perfect by themselves as an agreement by which the plaintiffs should be entitled, in the contingency named, to charge and collect the contemplated additional toll. Every part of the agreement, as to this additional toll, should be read as one instrument and one agreement. No part of it is collateral to and independent of any other part of it, and effect cannot be given to any one provision or paragraph, except in reference to and as modified by the other parts of the agreement relating to the same subject-matter. This is a leading canon in the interpretation of all covenants and written instruments.

The plaintiffs were secured the right to "charge and collect" toll on the defendant's coal; and it may be conceded the defendant undertook to pay, in addition to the toll before then chargeable, at a rate *to be established* after the canal enlargement should be completed in the manner particularly prescribed, and an arbitration was the final resort agreed upon to establish the rate and amount of toll, in case the contracting parties should not be able to agree, and the decision of the arbitrators was to be final in the premises. Both parties were to be concluded by it as to the amount or rate of toll which the one might exact and the other be compelled to pay. The manner by which the rate of toll was to be established was by the agreement of the parties, or, that failing, by arbitration. No other mode or manner was thought of or prescribed; and this manner being prescribed necessarily excludes every other method, as clearly and effectually as if the parties had said in terms that the rate should not be established by a resort to the courts or in any other manner, except by the parties, or, in case of their disagreement, by disinterested persons to be chosen for that purpose. *Expressio unius est exclusio alterius.* The parties have agreed to a rate "to be established in manner following;" and it would have added nothing to the legal effect to have added in terms that it should not be otherwise established, and excluded in

words the interposition of the courts. It is true the data from which and the rule and method of computation and calculation by which the additional rate was to be ascertained and adjusted is prescribed for the government of the parties, or those who, in their stead and as arbitrators or umpires, should act under this part of the agreement. That is, doubtless, a part of the process or formula for establishing the additional rate; but that alone did not and could not determine the rate. Action was to be had by the agents provided for, in conformity to and under the prescribed rule, and the *manner* of establishing the additional rate of toll was by the selection of the arbitrators, and their proceeding to ascertain the facts, and make the necessary estimates and the resulting calculations and computations.

Should the "manner following" receive a more restricted interpretation, and be regarded as strictly and literally referring to the rule given for estimating or ascertaining the reduction in the cost of transportation produced by the enlargement, and by no other cause, the fact still remains that the right of the plaintiffs is only to an additional rate of toll "to be established;" and the agreement prescribes the rule and designates the means and agency by which the additional toll is to be computed and estimated, and thus "established." The right of the plaintiffs to demand, and the obligation of the defendant to pay additional toll is restricted to the rate to be established pursuant to the agreement. The extent of the duty and the right were to be measured by the judgment and decision of the arbitrators, and not otherwise. The clear and plain intent of the parties was that the additional rate of toll should "be established," as preliminary to the right of the plaintiffs to charge and collect, and a formula was given by which it was contemplated that the parties would be able to agree upon the rate to be paid; but they also provided for the contingency of a disagreement in respect to the principal facts and estimates, upon the basis of which the additional toll was to be computed and established, and which, being ascertained, the rate of toll would be arrived at

by a simple arithmetical computation. The process by which the additional rate of toll was to be established was by ascertaining or estimating the cost of transportation prior to the enlargement, and the cost of transportation after the enlargement, and the amount of the reduction which should be produced by the enlargement, and by no other cause; and the one-half of the latter sum was agreed upon as the additional toll to be "thereafter permanently charged." If the managers should not be able to agree as to the amount of the reduction in the cost of transportation, and in the portion of such reduction which should be produced by the said enlargement, "the questions between them in respect thereto" were to be submitted to arbitration. Now while it is true that the parties have not in *totidem verbis* agreed that the additional rate of toll to be exacted shall be established by arbitrators, they have, in substance and effect, done so, by providing that in case of difference between the contracting parties the arbitrators shall determine and establish an amount, which, divided by two, will give the additional rate of toll intended to be established.

The amount of reduction produced solely by the enlargement of the canal was to be determined by arbitration, and the parties agreed that the one-half of that sum should be the additional rate. This was, in substance and effect, a provision for establishing the rate of toll to be charged and collected, in case of a difference between the parties, and equivalent to an agreement in words that, in case the parties should differ, arbitrators should be chosen who should, by the rules and formula prescribed, establish and determine the rate of additional toll, and that their award should be final. The subject-matter in view was peculiarly fit and proper for submission to the arbitrament of experts and practical business men rather than courts and juries; and the manner agreed upon was a provident and reasonable provision for the adjustment of rights and differences, which, in their nature, could not be as well or satisfactorily settled and determined in any other way. The relation of the parties to each other

and the character and extent of the business contemplated under the contract called for an amicable and speedy adjustment of the rate of toll, and the charges which should be imposed upon the property of one for the benefit of the other. Neither party contemplated the possibility of, or would have agreed to a rate of toll to be determined by a jury in an action which the plaintiffs might bring for the recovery of the toll upon the first cargo of coal that might pass through the canal after the enlargement. The right to the additional toll was given by the agreement, and could be enforced either by detention of the boat and cargo or by action; but the amount and measure of such additional toll was to be determined by arbitration, and as prescribed in the agreement.

The defendant only undertook to pay such rate of toll as should be established, as prescribed in the instrument, and cannot be compelled to acquiesce in the determination in any other manner, and until a rate is established, no liability is incurred under the contract or right of action given. This mode of adjustment and settlement of the rate is a part of the agreement for the additional toll, and modifies and qualifies the reservation of the right so that the right does not attach until the same is established. The determination and adjustment is a condition precedent to the right to demand and receive the toll, and no action will lie until the condition has been performed. Whether, when established, it would retroact and give a right to the additional toll from the time of the completion of the enlargement need not be considered. Neither need the effect of a refusal of the defendant to arbitrate nor any act on its part hindering and obstructing an arbitration be considered as the omission to arbitrate, and the failure to establish the additional rate of toll according to the terms of the agreement was not caused by the defendant. The plaintiffs seek without any valid reason, so far as appears by the case, to enforce the payment of an additional toll not established in the manner, and by the agents agreed upon, but by another tribunal. The defendant may well say that

is not the measure of liability to which it assented. Thus understood and interpreted, the case is not within the rule which nullifies contracts ousting the courts of their jurisdiction, but is within another rule equally well established by authority, and founded in good reason, that a person may covenant that no right of action shall accrue till a third person has determined any differences that may arise between the parties to the covenant or determined the measure of the liability of the covenantor, and the amount to which the covenantee shall be entitled.

The decisions of the courts of this state are to this effect, and are authoritative, and would be obligatory upon us even if they were not as well grounded in principle as they are. The principle was recognized by the chancellor and Senator TRACY in *Del. and Hud. Canal Co.* v. *Dubois* (15 W. R., 87), although not applied for the reason that the contract by which, among other things, it was referred to the engineer of the plaintiffs to estimate the amount and value of the work, and also to determine every other question necessary for the adjustment and final settlement of the contract, had been rescinded. In *Butler* v. *Duncan* (24 W. R., 447), the plaintiff had covenanted to do certain work to the satisfaction of third persons, and a declaration not averring that the work had been done to the satisfaction of the arbiters, was held bad on demurrer. To the same effect is *Smith* v. *Briggs* (3 Denio, 73), where the contract of the defendants was to pay the plaintiff, a builder, when he should receive the certificate of the architect that the work was finished according to the contract. *Smith* v. *Brady* (17 N. Y., 173) reaffirms the doctrine in a like case. A provision in a contract that the work under a contract with a railroad company should be executed under the direction of an engineer of the company, "by whose measurements and calculations the qualities and amounts of the several kinds of work performed" should be determined, and that his decision should be final, was held to be free of any legal objection, and obligatory upon the parties according to its terms. (*McMahon* v. *N. Y. & Erie R. R. Co.*, 20 N. Y.,

463.) The case at bar is not distinguishable in principle from those cited. It is not material whether the arbiters are to determine that a contract has been performed to their "satisfaction," or "according to the specifications annexed to the contract," or determine the quality of the work, and "measure and calculate the quantity and amount of the several kinds of work," or to compute and estimate the rate of toll to be paid, or the measure and value of any other thing, as a condition precedent to a right of action for either. The parties in this, as in the cases referred to, have agreed that the decision of the arbiters shall be final and obligatory.

Hurst v. *Litchfield* (39 N. Y., 377) was decided by the first paragraph in the opinion of the learned judge giving the judgment, and on the ground that the referee had found as a fact, which finding was conclusive on this court, that no question ever arose under the contract between the parties in relation to the value of the work, and that therefore there was nothing to submit under the submission claim. What is said, therefore, as to the validity of the clause is *obiter*, and can hardly be regarded as authoritative, or as the judgment of the court. Whether the determination of the amount and value of the work is a condition precedent to a right of action, depends entirely upon the interpretation of the whole contract. It may have been, in the case last cited, an independent covenant, and collateral to the other undertakings of the other parties. But the opinion is subject to the criticism, that its learned author does not discriminate between covenants ousting courts of their jurisdiction, and those merely providing for adjustments of certain disputes, or the ascertainment of values or quantities as preliminary to the existence of a cause of action, and a right to resort to the courts.

Wood v. *Lafayette* (46 N. Y, 484) was well decided, merely reaffirming, so far as the questions presented by this appeal are concerned, that the power of an arbitrator is revocable. That was the question also in *Smith* v. *Compton* (20 Barb., 262).

The agreement before the court in *Huggart* v. *Morgan* (1

Selden, 422) was that all disputes which should arise should be settled forthwith by arbitration, and therefore, if valid, would have ousted the courts of all jurisdiction, and within the settled rule, was held no bar to an action, the agreement to arbitrate only entitling the party to damages. These are all the cases from our own courts that need be referred to. The distinction between the two classes of cases is marked and well defined. In one class the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all disputes and differences by arbitration, to the exclusion of the courts, and in the other they merely, by the same agreement which creates the liability and gives the right, qualify the right by providing that before a right of action shall accrue certain facts shall be determined or amounts and values ascertained, and this is made a condition precedent either in terms or by necessary implication.

This case is within the latter class, and the condition being lawful, the courts have never hesitated to give full effect to it. The cases of *Kill* v. *Hollister* (1 Wils., 129); *Thompson* v. *Charnock* (8 T. R., 139); *Horton* v. *Sawyer* (4 H. & N., 643); *Gray* v. *Wilson* (4 Watts., 39); *Mitchell* v. *Harris* (2 Vesey, 129); *Roper* v. *Landon* (1 Ellis, [Q. B.] 825), and the other cases cited and relied upon by the plaintiffs, belong to the first class, and involved the validity of covenants which deprived the parties of the protection of the courts and ousted the courts of all jurisdiction. In none is the rule as qualified by the other class of cases questioned, and in some it is referred to with approval. The reports abound in cases in which the principle has been affirmed and applied. (See *Herrick* v. *Belknap*, 27 Vermont, 673.) In *United States* v. *Robeson* (9 Peters, 319), it was held that when the parties in the contract fix on a certain mode by which the amount to be paid shall be ascertained, the party that seeks the enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect; that he cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract,

or show that, by time or accident, he is unable to do so. Judge Story, in his work on Equity Jurisprudence, § 1457 *a*, thus states the rule: "But under a contract to pay the covenantee such damages in a certain contingency as a third person shall award, there is, in the absence of fraud, no cause of action either at law or in equity, unless the award is made," citing *Herrick* v. *Belknap* (*supra*), and *Scott* v. *Corporation of Liverpool* (3 De Gex & J., 334), as authorities. *Scott* v. *Liverpool* was the case of a contract for work, containing a provision for putting an end to the contract by the employer in a certain contingency, and that in such case they should pay the contractor such sum as the engineers should determine had been reasonably earned, and it was held that, in the absence of fraud or collusion, no action could be maintained, until after an award was made. Here the contract is to pay an additional rate of toll to be established by arbitrators to be chosen. And see *Brown* v. *Overbury* (11 Exch., 715).

Scott v. *Avery* (5 H. of Lords Cases, 811) is in principle on all fours with the case at bar, and, unless we are prepared to overrule or disregard it, is decisive. That was an action on policies of insurance, one of the conditions of which was that the sum to be paid for loss should, in the first instance, be ascertained by the committee, but if a difference arose between the insured and the committee, the difference was to be referred to arbitration in a way pointed out by the conditions, with a proviso that no one who refused to accept the amount settled by the committee, should be entitled to maintain an action at law or suit in equity on his policy until the matter had been decided by arbitration, and then only for such sum as the arbitrators should award. It was held that these conditions were lawful, and that till the award was made no action was maintainable. The House of Lords affirmed the judgment of the Court of Exchequer Chamber, reversing that of the Court of Exchequer. There, as in this case, in the language of Lord CAMPBELL. the rules and regulations for ascertaining the amount to be paid made part of the contract, and it is not material that there the contract was express that no

action should be brought until after the award, while in the contract before us it is implied. It is not necessary that it should be put in the technical form of a "condition precedent," and the courts will give effect to the real intention of the parties, as clearly indicated by the agreement. (See American note to *Braunstein* v. *Accidental Death Ins. Co.*, 1 Best & Smith, 101 Eng. Com. Law R., 783.) When, as here, the agreement is that the covenanter shall pay such sum, and only such sum, as shall be determined by arbitrators, the procuring an award is as clearly a condition precedent to an action, as if the parties had added, "and no action shall be maintainable until after the award of the arbitrators." Such a clause would be surplusage, and its insertion a work of supererogation. Mr. Justice CROWDER, in making response to the question propounded by the lords to the judges, in *Scott* v. *Avery*, thus states the question and the answer to it: "Can a shipowner and an insurer enter into a valid agreement that the shipowner shall pay down a given sum, and that in consideration of such payment the insurer upon the loss of a given ship shall pay to the said owner, not the amount of the loss sustained by her through the perils of the sea, but only such sum of money as shall be settled and ascertained by arbitration. I am not aware of any legal objection to such a contract, whatever may be thought of its prudence. And I think the effect of such a contract is, that no action lies for the breach of it, until the same has been ascertained by arbitration." The judge lays no stress upon the form of the contract, but regards the provision for determining the amount to be paid by arbitration as in legal effect postponing the right of action until after the award is made.

The lord chancellor (CRANWORTH), in assigning his reasons for an affirmance of the judgment of the Court of Exchequer Chamber, says: "That the meaning of the parties, therefore, was that the sum to be recovered should be only such sum as, if not agreed upon in the first instance between the committee and the suffering member, should be decided by arbitration, and no other, should be the sum to be recovered, appears

to me to be clear beyond all possibility of controversy. And if that was their meaning, the circumstance that they have not stated that meaning in the clearest terms, or in the most artistic form, is a matter utterly immaterial. What the court below had to do was to ascertain what was the meaning of the parties, as deduced from the language they have used."

The intention of the parties, as deducible from the contract, in his opinion was, "that the right of action should be not for what a jury should say was the amount of the loss, but for what the persons designated in that particular form of agreement should so say." Although the judges responding to the lords differed in opinion, there does not appear to have been any dissent from the judgment in the House of Lords by those taking part in the decision. (*Braunstein* v. *Accidental Death Ins. Co., supra; Tredman* v. *Holman*, 1 Hurls. & Colt., 72, followed *Scott* v. *Avery*.) In Braunstein's case the policy did not, in terms, declare that the award of arbitrators should be a condition precedent to the bringing of an action. The condition was to the effect that, in case of difference of opinion as to the amount of compensation, the question should be referred to arbitration, and the award made should be taken as a full settlement of the question, and the legal effect was to prohibit an action until the amount was determined by the award. The court held that the parties had used sufficient words to make the reference to arbitration a condition precedent. The defendant has, in substance, covenanted to pay additional toll at such rate as should be established by the parties, or, in case of their disagreement, by arbitrators to be selected for that purpose, and neither party has agreed to acquiesce in a rate of toll to be established by any other tribunal. As before suggested, while the arbitrators are not required, in terms, to halve the sum estimated as the reduction in the cost of transportation, produced solely by the enlargement of the canal, and in form award the quotient to be the additional rate of toll thereafter to be charged, it is declared and agreed that they shall ascertain and determine the reduction of the cost thus produced, and

that one-half of the reduction thus ascertained shall be the additional toll. In substance, therefore, the arbitrators are to establish the toll, *Id certum est quod certum reddi potest.* Every essential fact was to be settled by arbitration in case of a difference of opinion, and the award of the arbitrators would have been a substantial establishment of the additional rate of toll, and such was clearly the intent and meaning of the parties. It is the toll which should be established in this particular manner and none other that the plaintiffs are authorized to charge and collect either by distress or action; and this, and this only, is the toll which the defendant has undertaken to pay. The boats of the defendant could not be detained or its coal seized for the collection of the toll, without the amount was established, that is, ascertained and made certain. (*Penn. Coal Co.* v. *Del. & Hud. Canal Co.*, 40 N. Y., 72.) The defendant could not be put in default for non-payment of the toll until, in like manner, the amount payable was ascertained and established, and no action is maintainable until after default. When the right to the additional toll became perfect the plaintiffs had the right of distress or a right of action. The remedies were concurrent, and under the agreement the right was not perfect until the rate was established. The defendant had not agreed to pay a reasonable toll. Had that been the contract, a right of action might accrue, although the right of distress might not exist for want of certainty as to the amount payable. But the parties did not intend to leave the amount uncertain, and have agreed in what manner and by whom the amount should be determined, and the intent is clearly manifested from the terms used, and the construction of the contract to make the award a condition precedent to the right of action for the additional toll. This is an especially reasonable provision in this contract, as before suggested. And again, the defendant was not bound to send a ton of coal over the plaintiffs' canal, and it was right and proper therefore that the toll to be exacted and collected should be known, even in advance of its actual imposition, that they might elect whether to send coal to market by that

route. (*Hudson Canal Co.* v. *Penn. Coal Co.*, 8 Wallace, 276.)

There is another objection equally fatal to the plaintiffs' action. As it is elaborately considered by Judge PECKHAM in the court below, a very brief statement of it here is all that is necessary. In adjusting and establishing the rate of toll to be paid upon the coal transported upon the plaintiffs' canal, prior to the completion of the enlargement, the parties had in view and estimated the actual cost, to the defendant, of the mining and carrying its coal to its place of deposit at or near the terminus of the plaintiffs' canal on the Hudson river, and one-half of the difference between this amount and the price at which sales of coal were made to be ascertained as particularly prescribed from year to year, was agreed upon as the rate of toll prior to the enlargement. The toll to be paid to the plaintiffs was to be a specified portion of the price at which coal should be sold in excess of such cost. This was the profit upon the sale of the coal at Rondout which would be realized, estimating the actual cost of the coal laid down at that point at two dollars and fifty cents per ton. But in all the negotiations and estimates upon which the negotiations were based and the final agreement made, the parties had in view the actual cost to the defendant of placing its coal at Rondout.

The defendant was protected against loss under this arrangement, resulting from an increase in the cost of transportation, or other increase in its expenditures in the business, from any cause, by the fact that it was not under obligations to send a ton of coal over the canal. If, by reason of an increase in the price of labor, the cost of provisions or other cause it should find itself unable to lay its coal down at Rondout, at a cost of two dollars and fifty cents per ton, it could cease to send its coal under the agreement. If the language of the agreement were less explicit than it is, it would be a reasonable and almost necessary inference that the parties did not intend, in providing for a future provisional increase of toll, to depart from this safe and certain

basis of the actual cost of the transportation, which was one of the items entering into the cost to the defendant, of laying its coal down at tide water, and adopting the uncertain, visionary and chimerical basis which was adopted by the referee in this case; an estimate wanting every element of certainty, in every stage of its progress, and all the parts that went to make up the whole; an estimate that was little better than a conjecture, and leading to results unjust in the extreme to the defendant.

The direct effect of the rule of interpretation adopted by the referee, as carried out in his estimates and by his report, was to subvert the scheme of the contract and destroy the equitable rule by which the parties had agreed to participate in the proceeds of or profits upon the sale of the defendant's coal at tide-water, and give to the plaintiffs a portion not contemplated, and to cast upon the defendant the entire risk of a contingent or possible increase in the cost of the service to be rendered by it in the promotion of what may, under the circumstances, be regarded as somewhat in the nature of a joint adventure for the mutual benefit of each. It would require positive and explicit language, indicating clearly an intent thus to vary the relative position of the parties under the contract, to justify an interpretation which would accomplish such a result.

So far from the terms of the contract calling for such a construction, they do not, upon a fair and reasonable interpretation, admit of it. The words are well chosen to declare a very different meaning, and one more in harmony with the general purpose and intent of the parties. But little will be derived in seeking after the meaning of the parties by a recourse to the technical meaning of the words used. The facts to be arrived at in the process of establishing the additional tolls were capable of being certainly known; and they were of such a character that it was essential that they should be certainly known and not conjectured. Accuracy in the data for the fixing the additional toll was important to both parties; and it cannot be assumed that they intended to sub-

stitute opinion or conjecture for positive and certain evidence. The two facts to be ascertained were, first, the cost per ton of transportation before the enlargement; and, second, the cost of transportation after the enlargement. The cost of transportation at these two periods was to be "ascertained or estimated;" the same terms being employed as to each. As used, the words simply required the cost to be made certain, either by trial, examination or experiment, or by computation or calculation, that way in which, under the circumstances, the cost could be most certainly known. But whatever might be the process, the actual cost was the precise thing to be ascertained and known, and not the judgment or opinion of the parties, or of the arbitrators, as to what the coal might be transported for. That which was capable of being certainly ascertained was to be ascertained, and from the best and most reliable data. The portion of the reduction, or the actual cost, which should be produced solely by the enlargement of the canal, was not capable of being certainly ascertained, and, therefore, that was to be estimated; that is, determined by the best judgment of those competent to form an opinion. But before there could be occasion for an opinion or action, under this head of the agreement, a reduction in the actual cost of transportation must exist; and this is to be established by ascertaining the actual cost both before and after the enlargement.

The fact that there has been no reduction in the cost of transportation since the enlargement cannot affect the reading of the contract. The cost to be ascertained could not, in the nature of things, mean anything but the actual expenditure or outlay in the transportation. Before the enlargement was to be credited with any result, or to affect the tolls, the cost was to be reduced. Had not the parties intended that an actual reduction in the cost of transportation should be established as a condition precedent to the right to increased tolls, they would not have referred to the cost of transportation at either of the periods referred to, as such cost would have had no practical bearing upon the question to be determined, or

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the rate of toll to be paid on account of the enlargement. The provision would have been much more simple, and would have required merely an estimate of the pecuniary benefit to the defendant of the enlargement; an estimate of the saving in expense to the carrier in the enlarged over the smaller canal. But that was not the view or intent of the parties when the contract was made. In the opinion of the court it is clearly deducible from the terms of the contract that the parties intended to entitle the plaintiffs to demand and collect additional tolls; that, first, the cost of transportation upon the canal should be actually reduced or diminished; and, second, that some part of such reduction should be produced by the enlargement and no other cause.

It is conceded that there has been in fact no reduction or diminution in the cost of transportation since the enlargement, but, on the contrary, the cost has largely increased. It follows that there is no foundation for any claim to additional toll under the contract.

The judgment must be reversed and a new trial granted, costs to abide event.

All concur, PECKHAM, J., not sitting.

GROVER, J., concurs on the second ground, without expressing an opinion on the ground first considered by ALLEN, J.

Judgment reversed.

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THE PEOPLE EX REL. EDWARD P. UNDERWOOD, Appellants, *v.* EDWARD S. DANIELL, Major and President of a Court-Martial, etc., Respondent.

The fact that courts-martial were authorized by statute prior to or soon after the adoption of the first Constitution of this State; that when the subsequent Constitutions were framed these tribunals thus authorized were in the open and continued exercise of their authority; that when in either of the Constitutions existing courts were abolished or modified, it was done by express provision, and that there is no provision in terms modifying or abolishing courts-martial, are evidence that no such abolition was intended. The fact, therefore, that they are not included in the courts authorized to be established by the legislature by the provisions of the

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new judiciary article adopted in 1869 (Const., art. 6, § 19) does not by implication prohibit their establishment. Courts-martial are also necessary incidents to the "discipline" of the State militia and the provision of the Constitution requiring the militia to be "armed and disciplined" (art. 11, § 1); also the provision that no person shall be held to answer for a capital or otherwise infamous crime except on indictment, except in cases of the militia, etc. (art. 1, § 6), recognize their existence. They are, therefore, constitutional.

The legislature has the power to direct the enforcement of valid judgments by imprisonment in case property cannot be found. The provision, therefore, of the Military Code of 1870 (§ 214, chap. 81, Laws of 1870), authorizing the arrest of a delinquent in case sufficient goods and chattels cannot be found to satisfy a fine or penalty imposed by court-martial, is constitutional.

(Argued June 11, 1872; decided November 12, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming and sustaining the proceedings of a court-martial of the 13th regiment of the National Guard of the State of New York, of which defendant was president, which were brought up for review by certiorari. (Reported below, 6 Lans., 44.)

On the 3d day of January, 1871, a regimental court-martial was appointed by special order for the trial of delinquencies, etc., in said regiment. Defendant was detailed for said court. He took the prescribed oath, and opened said court at regimental head-quarters January 27, 1871.

On the 27th of January, 1871, a summons was issued by him, as president of such court-martial, directed to relator, who was and is a private in H company, in said regiment, requiring him to appear before said court-martial on the 14th of February to answer certain delinquencies specified in said summons, which summons was personally served on relator.

At the time specified relator appeared and objected to the jurisdiction of said court-martial upon the ground that the provisions of the act known as the Military Code, passed March 17th, 1870, under which said court-martial was organized, or so much thereof as prescribed the method of procedure and the method of enforcement of its sentences, were unconstitutional, which objection was overruled.

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the rate of toll to be paid on account of the enlargement. The provision would have been much more simple, and would have required merely an estimate of the pecuniary benefit to the defendant of the enlargement; an estimate of the saving in expense to the carrier in the enlarged over the smaller canal. But that was not the view or intent of the parties when the contract was made. In the opinion of the court it is clearly deducible from the terms of the contract that the parties intended to entitle the plaintiffs to demand and collect additional tolls; that, first, the cost of transportation upon the canal should be actually reduced or diminished; and, second, that some part of such reduction should be produced by the enlargement and no other cause.

It is conceded that there has been in fact no reduction or diminution in the cost of transportation since the enlargement, but, on the contrary, the cost has largely increased. It follows that there is no foundation for any claim to additional toll under the contract.

The judgment must be reversed and a new trial granted, costs to abide event.

All concur, PECKHAM, J., not sitting.

GROVER, J., concurs on the second ground, without expressing an opinion on the ground first considered by ALLEN, J.

Judgment reversed.

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The fact that courts-martial were authorized by statute prior to or soon after the adoption of the first Constitution of this State; that when the subsequent Constitutions were framed these tribunals thus authorized were in the open and continued exercise of their authority; that when in either of the Constitutions existing courts were abolished or modified, it was done by express provision, and that there is no provision in terms modifying or abolishing courts-martial, are evidence that no such abolition was intended. The fact, therefore, that they are not included in the courts authorized to be established by the legislature by the provisions of the

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new judiciary article adopted in 1869 (Const., art. 6, § 19) does not by implication prohibit their establishment. Courts-martial are also necessary incidents to the "discipline" of the State militia and the provision of the Constitution requiring the militia to be "armed and disciplined" (art. 11, § 1); also the provision that no person shall be held to answer for a capital or otherwise infamous crime except on indictment, except in cases of the militia, etc. (art. 1, § 6), recognize their existence. They are, therefore, constitutional.

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(Argued June 11, 1872; decided November 12, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming and sustaining the proceedings of a court-martial of the 13th regiment of the National Guard of the State of New York, of which defendant was president, which were brought up for review by certiorari. (Reported below, 6 Lans., 44.)

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At the time specified relator appeared and objected to the jurisdiction of said court-martial upon the ground that the provisions of the act known as the Military Code, passed March 17th, 1870, under which said court-martial was organized, or so much thereof as prescribed the method of procedure and the method of enforcement of its sentences, were unconstitutional, which objection was overruled.

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The relator then severally demanded permission to be represented by counsel, that he be tried by a jury, and that such trial be public, all of which were denied him.

And thereupon relator, entering his protest against the jurisdiction of the court and the mode of procedure, withdrew.

The said court-martial proceeded to take testimony tending to establish the alleged delinquencies, and adjudged relator to be guilty thereof, and sentenced him to be fined therefor, the whole amounting to eighteen dollars, which findings and sentence were certified to the brigadier-general appointing such court-martial and by him approved.

And thereupon the said Major E. S. Daniell, as president, etc., issued his warrant to the marshal of said court, directing said marshal to levy and collect said fines, with his costs, of the goods and chattels of relator, and in default thereof to arrest relator and convey him to the county jail of the county of Kings and deliver him to the jailor thereof.

Samuel Hand and *H. E. Sickels* for the appellants. A common law certiorari lies upon all adjudications of an inferior court, tribunal or officer, which court or officer acts in a summary way, or in a course different from the common law. (*Stone* v. *Mayor, etc.*, 25 Wend., 157; *Leroy* v. *Mayor, etc.*, 20 John., 429; *The People ex rel.* v. *City of Rochester*, 21 Barb., 656.) The Supreme Court has the supervisory control over, and the office of the writ is to review all questions of jurisdiction, of power, of authority, and all questions of regularity in proceedings. (*Stone* v. *Trustees of Rochester*, 6 Wend., 504; *Tallman* v. *Bigelow*, 10 id., 421; *Simpson* v. *Rhinelanders*, 20 id., 103; *People* v. *First Judge of Columbia*, 2 Hill, 398; *People* v. *Van Alstine*, 32 Barb., 131; *People ex rel.* v. *Supervisors of Livingston County*, 43 id., 432; *People* v. *Goodwin*, 1 Seld., 568, 572, and cases cited; *Hill et al.* v. *M. and H. R. R. Co.*, 3 id., 152; *People ex rel.* v. *Commissioner of Taxes, etc.*, 23 N. Y., 192, 222; *People ex rel.* v. *Board of Assessors of Brooklyn*, 39 id., 81.)

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The provision of the Military Code (Laws of 1870, chap. 80, art. 13, p. 222) organizing courts-martial, and under which these proceedings were had, is unconstitutional and void. (Con., art. 6, § 19; *Matter of Albany St.*, 11 Wend., 149; *Matter of J. and C. Sts.*, 19 id., 659, 676; *Bloodgood* v. *M. and H. R. R. Co.*, 18 id., 959; *Taylor* v. *Porter*, 24 Hill, 140, 146; *Barto* v. *Himrod*, 8 N. Y., 483, 489; *Haynor* v. *James*, 17 id., 316, 327; Con., art. 1, § 1; *Taylor* v. *Porter et al.*, 4 Hill, 140; *People* v. *Howes*, 37 Barb., 440, 456; *Wynehamer* v. *People*, 13 N. Y., 378, 392, 416; *Rockwell et al.* v. *Nearing*, 35 id., 302, 305; *In Matter, etc., of Townsend*, 39 id., 171, 180; 2 Kent's Com., 13; Story on Con., 661; 2 Coke Inst., 45, 50; *Westervelt* v. *Craig*, 12 N.Y., 212; Con., art. 1, § 2; *Wynehamer* v. *People*, 13 N. Y., 378, 426, 456; Laws of 1846, chap. 139, § 1; Laws of 1846, chap. 270, § 89; *Wood* v. *City of Brooklyn*, 14 Barb., 432; *Rockwell* v. *Nearing*, 35 N. Y., 302, 306.)

John E. Burrell and *Jas. B. Craig* for the respondent. The proceedings in question are not in violation of article five of first amendment to the federal Constitution. ' (*Livingston* v. *The Mayor*, 8 Wend., 100; *Jackson* v. *Wood*, 6 Cowen, 818, note; *In re Smith*, 10 Wend., 449; *Lee* v. *Tillotson*, 24 id., 337; *Barker* v. *The People*, 3 Cowen, 686; S. C., 20 Johns., 457.) Provisions of the Military Code of the act of 1870, under which this court-martial was organized, are constitutional. (*Leggett* v. *Hunter*, 19 N. Y., 445; *Rockwell* v. *Nearing*, 35 id., 304; *Westervelt* v. *Gregg*, 12 id., 209, 212; *Taylor* v. *Porter*, 4 Hill, 146, 147, 152; *Livingston* v. *Mayor*, 8 Wend., 85; *Bloodgood* v. *Mohawk Co.*, 18 Wend., 1; *Rathbun* v. *Sawyer*, 15 id., 451; 1 R. S., 304, 312; *Murphy* v. *The People*, 2 Cowen, 815; *Duffy* v. *The People*, 6 Hill, 75; *Plato* v. *The People*, 3 Park. Cr., 586; *Gildersleve* v. *The People*, 10 Barb., 35 [recognizance]; *In re Empire City Bank*, 18 N. Y., 199; S. C., 8 Abb. Pr., 192; *In re Smith*, 10 Wend., 449; *Leggett* v. *Hunter*, 19 N. Y., 445; *Bank* v. *Brown*, 26 id., 467, 529; *Clark* v. *Miller*, 42 Barb., 255;

Luke v. *City*, 43 id., 54.) Trials by court-martial are authorized by the federal Constitution and laws. (U. S. Con., art. 1, § 8, sub. 15; 2 U. S. Stat. at Large, 359; *Ex parte Milligan*, 4 Wal., 123, 127; *People* v. *Mollineaux*, 40 N. Y., 113.)

PECKHAM, J. Appeal from the judgment of the General Term in the second department of the Supreme Court, affirming the proceedings of the court-martial, of which the defendant was president. The court-martial tried the relator for not attending certain parades or drills—some five of them—and sentenced him to pay a fine of eighteen dollars in all, as provided by the statute. (1 Sess. L. of 1870, p. 270, § 207.)

The relator, upon being personally summoned, appeared before that court, denied its jurisdiction upon the ground that the act of 1870 under which it was organized was unconstitutional, demanded a trial by jury, and also that he be allowed to appear by counsel. His objections were overruled, and the delinquencies having been proved, that tribunal found him guilty of the charges and imposed said fines. The president subsequently issued the precept or execution to commit the relator to jail in default of property to satisfy the amounts.

The point as to the right to appear by counsel before the court-martial is expressly waived by the appellant, and is therefore not considered.

It is insisted that the act establishing this military court is unconstitutional and void; that these are not local courts. The argument is based upon the judiciary article of our State Constitution, adopted in 1869, which modifies the courts generally, as then established, and then authorizes the legislature to establish "inferior local courts" of civil and criminal jurisdiction; thus, by implication, prohibiting the establisment of any other. (Art. 6, § 19.) The existence of this military court is also claimed to be in violation of various provisions of the Constitution as to the rights of citizens.

It is singular, if there be force in these objections, that they should never before have been presented, so far as we know,

to any court, although the legality of the proceedings of these tribunals has been often assailed in the courts.

The provisions of each Constitution of our State on this subject have been substantially the same. The fact, then, that they have thus stood unquestioned for nearly a century, is clear evidence of the opinion of the bar as to their constitutionality.

The several Constitutions of this State afford at least negative evidence that these tribunals were not aimed at in any provision to abolish or modify any court. These tribunals were authorized by statute while this State was yet a colony, and within ten years after the adoption of the first Constitution, viz., in April, 1786, they were authorized under the act "to regulate the militia." (1 Laws of N. Y., Green ed., 227.) Modified in various ways by statute, they have continued ever since.

When the subsequent Constitutions were framed, these tribunals, plainly authorized by statute, were in the open, continued exercise of their authority, yet not a word is found either in the Constitutions of 1821, 1846 or in the judiciary article adopted in 1869, abolishing or modifying them in terms or by plain implication.

But where in either of them existing courts were abolished or modified, it was done by plain, express provision.

The failure to modify or abolish these tribunals in the manner adopted as to other existing courts, is evidence that no such abolition was intended.

A change so radical as the total abolition of these military tribunals, then, plainly authorized by the statute, and which have existed in civilized nations almost from time immemorial, would scarcely have been left to uncertain implication. It is fair to infer that the convention, knowing of the existence and use of these military tribunals, intended to leave them to be regulated by law. (*Livingston* v. *The Mayor of N. Y.*, 8 Wend., 102; *Beekman* v. *Sar. & Sch. R. R. Co.*, 3 Paige, 75; *In re. Smith*, 10 Wend., 450.)

No discussion or proposition for their abolition was heard

of in the convention that framed the present judiciary article of the Constitution, and it is clear that the convention did not intend to abolish them.

There is also an affirmative recognition in the Constitution of these tribunals.

The Constitution declares, that "the militia of this State shall at all times hereafter be armed and disciplined and in readiness for service." (Art. 11, § 1.) (This provision is contained in all the Constitutions of our State.)

It also provides that no person shall be held to answer for a capital or otherwise infamous crime, unless on indictment, "except in cases of the militia, when in actual service, and the land and naval forces in time of war, or which this State may keep, with the consent of congress, in time of peace." (Art. 1, § 6, Const. of 1846.)

These provisions recognize the existence of courts-martial. They are a necessary incident to the "discipline" of the militia, though not regarded as courts of justice within the prohibition of the Constitution. (*In re Smith*, 10 Wend., 449.)

The provision in each Constitution requiring the militia to be disciplined, implies that there must be some tribunal to enforce it. For that purpose there has never been any other than these military tribunals, and there is nothing in either Constitution that manifests an intent to abolish them.

In re Smith (*supra*), the question of the constitutionality of the law allowing a medical society to try a member was raised against the action of the medical society in trying Smith for an alleged misdemeanor. The court held it to be mere discipline, and that that tribunal was not exercising the usual jurisdiction of ordinary courts of justice, and was therefore not within the prohibition against new courts. Nor is this statute in conflict with the provisions of the Constitution, declaring that "no member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." (Art. 1, § 1.) Nor with the

provision that "no person shall be deprived of life, liberty or property without due process of law." (Art. 1, § 6.)

These provisions in the Constitution are very ancient, and have always been the law of our State. I think they are in harmony in their substance. I believe no court has ever yet questioned the right of these tribunals to exist, and to exercise their authority within its proper limits.

It is also argued that this statute is in conflict with the provision of the Constitution that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever." (Art. 1, § 2.)

It is urged that it is "at least in conflict, in that it authorizes the arrest and imprisonment of the delinquent." This provision of the Constitution is much like those just before considered. These constitutional objections were all raised in *In re Smith* (*supra*), and in the other cases also, and held not to apply.

That this act authorizes the arrest and imprisonment of the delinquent upon the execution, has nothing to do with the right of trial by jury. If the judgment be right, the legislature has the undoubted authority to declare whether the delinquent may be imprisoned, if the officer fail to find sufficient goods.

By two acts of 1846, the legislature declared that in certain cases he should not be imprisoned. By the statute of 1870 they enacted that he might be, in certain cases, and the legislature of 1870 had the same power as that of 1846.

The points involved in this case do not appear to us to require a more particular discussion. The question of the right to a certiorari in this case was not raised, and is not considered.

The judgment should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

JAMES M. ANDREWS, Receiver, etc., Respondent, *v.* THE GLENVILLE WOOLEN COMPANY, Appellant.

Where proceedings conducted by one party for his own benefit in the name of another are restrained by an injunction directed to the nominal party, the damages and expenses incurred by the real party in interest in procuring a discharge of the injunction will be presumed in law to have been incurred by the defendant on the record, and are recoverable in his name for the benefit of the real party in interest.

On an assessment of damages upon an undertaking given upon the granting of a temporary injunction which restrained legal proceedings for the collection of a demand, it is not competent to go into the merits of the proceedings restrained, unless the party prosecuting the reference claims as damages the loss of his demand.

Expenses properly incurred on the part of the defendant for the purpose of dissolving an injunction are legally allowable as damages, and when a motion has been made to dissolve the injunction, which was denied, not upon the merits or for irregularity, but because the court in its discretion thought it advisable to defer the inquiry into the merits until the final hearing, the expenses of the motion and also counsel fees upon the trial are proper items of damages.

(Submitted June 18, 1872; decided November 12, 1872.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, reversing an order of Special Term confirming the report of a referee upon assessment of damages occasioned by an injunction herein. The injunction order restrained defendant, its attorney, etc., and all persons acting in its name, from taking any steps to compel the payment of certain judgments which had been recovered in the name of defendant.

These judgments were recovered in the name of the company by persons who claimed to be attaching creditors, and who claimed the right to conduct the actions through their own attorney, using the name of the company pursuant to the provisions of sections 232 and 238 of the Code. The order of injunction was granted upon allegations that certain other creditors had attached the demands upon which the judgments were obtained, and had proceeded to judgment and execution

against the company, and in proceedings supplementary to execution plaintiff had been appointed receiver of the demand, and was entitled to collect them. Plaintiff gave the usual undertaking. A motion was made to dissolve the injunction, which was denied, the court declining to inquire into the merits until the final hearing. On the final hearing plaintiff's complaint was dismissed, and the attorney who had prosecuted in the name of the company the actions enjoined obtained the usual order of reference to ascertain the damages sustained by the injunction. Plaintiff objected upon the hearing that as it appeared that defendant was merely a nominal party, having no interest in the result, it sustained no damages, and that the attaching creditors using its name were not named as defendants, nor were the undertakings made to them, and therefore they could recover no damages thereon; also, that these creditors who had assumed the right to prosecute the actions as attaching creditors had no such right, as their attachment had never been properly served. The referee overruled these objections and allowed as damages the expenses of the motion to dissolve the injunction and a counsel fee on trial, also the fees of referee on assessing of damages. For a further history of the controversy between the attaching creditors, see *O'Brien* v. *The Glenville Woolen Co.* (*ante*, p. 128).

Henry Whittaker for the appellant. The costs and counsel fees of the trial and of the preliminary motion to dissolve were damages sustained by reason of the injunction. (*Strong* v. *De Forrest*, 15 Abb., 427, note, p. 428; *Edwards* v. *Bodine*, 11 Paige, 223; *Aldrich* v. *Reynolds*, 1 Barb. Ch., 613; *Coates* v. *Coates*, 1 Duer, 664; approved, 24 N. Y., 106; *Willett* v. *Scovill*, 4 Abb., 406; *Wilde* v. *Joel*, 15 How., 320, 323; *Fitzpatrick* v. *Flagg*, 12 Abb., 189.) This court favors a liberal rule of damages in cases like the present. (*Corcoran* v. *Judson*, 24 N. Y., 106; *Barton* v. *Fisk*, 30 N. Y., 171; *Coates* v. *Coates*, 1 Duer, 664; *Edwards* v. *Bodine*, 11 Penn., 224.)

Lucien Birdseye for the respondent. Isham not being

joined as a defendant, was not bound by the injunction, and can claim no damage under it. (1 Barb. Ch. Pr., 632; *Sage* v. *Quay*, 1 Clark, 347; see also to S. P., 19 Barb., 356, 361; affirmed, 16 N. Y., 543; *Fitzpatrick* v. *Flagg*, 12 Abb., 189.) Only costs and fees necessary to obtain a dissolution of the injunction and incurred directly on account of it are recoverable. (*Childs* v. *Lewis*, 3 Robt., 704; *Beir* v. *Heath*, 12 How. U. S., 179; 19 Curtis Decisions, 176; *Coates* v. *Coates*, 1 Duer, 664; *Edwards* v. *Bodine*, 11 Penn., 223, 227; *Wilde* v. *Joel*, 15 How. Pr., 320; *Strong* v. *De Forrest*, 15 Abb., 427; *Taacks* v. *Schmidt*, 18 id., 307, 333–335; *Aldrich* v. *Reynolds*, 1 Barb. Ch., 613; *Willett* v. *Scovill*, 4 Abb., 405; *Fitzpatrick* v. *Flagg*, 12 id., 189; *Corcoran* v. *Judson*, 24 N. Y., 106.)

RAPALLO, J. The order of injunction restrained the Glenville Woolen Company, its attorneys, etc., and all persons acting or pretending to act in its name or on its behalf, from taking any steps or proceedings to compel the payment of certain judgments which had been recovered in the name of that company against Ripley & Cameron; from which judgments appeals were pending.

These judgments had been recovered in the name of the company by persons who claimed to be attaching creditors of the company (a foreign corporation), and who also claimed the right to conduct the actions through their own attorney, and to use the name of the company therein, pursuant to the provisions of section 232 and 238 of the Code. The order of injunction was granted upon allegations that certain other creditors of the company had attached its same demands against Ripley & Cameron, and had proceeded to judgment and execution against the company; and that, in proceedings supplementary to such execution, the plaintiff had been appointed receiver of the demands in question, and was entitled to collect them.

On the final hearing the complaint of the plaintiff was dis-

missed, and a reference ordered, to ascertain the damages caused by the injunction.

The undertaking given on the granting of the order of injunction was to pay to the defendants enjoined such damages as they might sustain by reason of the injunction, if the court should finally decide that the plaintiff was not entitled thereto.

The first objection taken by the plaintiff to the allowance of damages made by the referee is that, on the defendants' own showing, the Glenville Woolen Company was a merely nominal party, having no interest in the controversy, and, therefore, sustained no damages by reason of the injunction; and that the attaching creditors, who were using its name, were not named as defendants, nor was the undertaking made to them, and, therefore, they could not recover upon it any damages sustained by them.

If this objection was valid it shows that the undertaking had no force or effect whatever; and that a party who is prosecuting a claim according to law in the name of another person may be enjoined in fact, though not by name, without having the indemnity which the Code purports to provide, in case it should result that there were no grounds for the injunction. Such a conclusion should not be drawn unless clearly required by law; for it would be not only exceedingly unjust to the party whose proceedings are enjoined, but would also liberate the applicant for the injunction from the wholesome condition which the law imposes upon him of giving security for the damages he may occasion, should his claim prove to be without foundation. It seems to me more reasonable to hold that when proceedings, conducted by one party for his own benefit in the name of another, are restrained by an injunction not directed to the party in interest by his name, the damages and expenses incurred by him in procuring the discharge of the injunction should be presumed in law to have been incurred by the defendant on the record, and should be recoverable in his name for the benefit of the real party in interest.

It is objected, however, on the part of the plaintiff, that although the creditors whose proceedings were enjoined, claimed and assumed to exercise the right, as attaching creditors, to use the name of the company, having given security to the sheriff pursuant to section 238 of the Code, yet that, in point of fact, they had no such right, for the reason that their attachments had never been properly served; and, in support of this objection, the plaintiff introduced before the referee the record of a subsequent judgment in another action to which all the attaching creditors were parties, which judgment is alleged to establish that there never was any legal service of the attachments under which the proceedings enjoined were being carried on.

We think the referee was right in not sustaining this objection. No such question could properly be tried before him. On an assessment of damages, caused by an injunction which restrains legal proceedings for the collection of a demand, it is not competent to go into the merits of the proceedings restrained, unless, perhaps, in a case where the party prosecuting the reference claims as damages the loss of his demand; where, as in this case, he merely seeks to recover his expenses of getting rid of the injunction, the merits of the proceeding restrained are not a proper subject of inquiry. If the restraint was wrongful the party restrained had a legal right to have it removed, and is entitled to his expenses reasonably incurred in establishing that right. Neither was the inquiry proper in this case for the purpose of showing that the attaching creditors had no right to defend against the injunction or to prosecute the reference. The company was the defendant on the record. It had the right to defend, and the defence was made by its attorney of record, and the damages were claimed in its name. The plaintiff has no right to question, in this collateral manner, the right of the attorney to appear; nor does it concern the plaintiff whether the damages are to inure to the benefit of the company, defendant, or of others claiming through it. It is enough, as to him and his sureties, that he caused to be restrained proceedings which other parties

claimed the right to carry on, and the court has decided that he was not entitled so to restrain them. Whether in fact the proceedings restrained were or were not rightfully conducted he was not in a position to try, or to compel the defendant to try, upon the reference as to damages. The lawfulness of the restraint was the material point upon which the liability of the sureties depended. This question having been finally decided adversely to the plaintiff, his sureties became liable upon their undertaking.

Expenses properly incurred on the part of the defendant, for the purpose of dissolving an injunction, were legally allowable as damages. The only items allowed by the referee were the expenses of a motion to dissolve and a counsel fee on the trial, together with the fees of the referee for assessing the damages. The amounts of these several items are not the subject of dispute.

The expenses of the motion to dissolve are objected to on the ground that the motion was denied. But the evidence and finding of the referee show that it was not denied upon the merits, nor for any irregularity in making the motion, but because the court, in its discretion, thought it more advisable to defer the inquiry into the merits until the final hearing. It was proper that the defendant should move, at the earliest opportunity, to dissolve the injunction. His motion did not fail through any fault on his part, or any defect in the merits of his case. The court simply deferred its decision upon the merits until the trial. The result, which must, for the purposes of this application, be assumed to be correct, shows that if the decision had not thus been deferred the motion should have been granted when made. Under these circumstances I think that the expenses of the motion were reasonably and properly incurred, as a direct consequence of the injunction, and were properly allowed by the referee.

The other item objected to was the counsel fee upon the trial. Ordinarily this would not be allowable; but, under the circumstances of this case, I think it was. The defendant

Statement of case.

made the proper effort to dissolve the injunction before the trial. The court required that the question should be deferred, to be disposed of on the trial. A trial was therefore necessary, not merely to dispose of the issues, but to get rid of the injunction. Until the cause should be tried the defendant was obliged to submit to the restraint. It was placed in that position by the order of the court, and not by its own laches.

But for the injunction, the defendant might have collected the money before any trial; and as the only relief demanded against it by the complaint was to restrain this collection, it is not certain that the case would ever have been brought to trial had the collection been first accomplished.

The question whether the order was appealable was not raised, and has not been considered.

We therefore think that the conclusions of the referee were correct, and that the order of the General Term should be reversed, and that of the Special Term affirmed, with costs.

All concur.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK, Appellants, *v.* ENOCH L. FANCHER, Respondent.

A written Constitution must be interpreted rather with reference to its special and general intent and the ordinary and usual sense of the phraseology than to the literal and technical meaning of the words used. The words "in session," as used in section nine of article six of the State Constitution, which authorizes the governor, when the senate is not in session, to fill temporarily, by appointment, a vacancy in the office of justice of the Supreme Court, indicate a present acting or being of the senate as a body. When the sittings are terminated by a long adjournment, and the actual meetings of the body thus interrupted, although the session is continued, the senate is not "in session" within the intent and meaning of that section, and an appointment made by the governor during such an adjournment is valid.

(Argued November 11, 1872; decided November 19, 1872.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, rendered in favor of defendant upon a case submitted under section 372 of the Code, for the purpose of determining defendant's right to the office of justice of the Supreme Court.

The legislature met, according to law, on the first Tuesday of January, 1872, and ended the regular session on May 14, 1872, by adjourning *sine die*. After such final adjournment, and on May 14, 1872, the governor, by proclamation, under section 4 of article 4 of the Constitution, convened the senate in extraordinary session for the purpose of acting upon charges against certain judges, and for the consideration of such other business as he might bring before them. Under this proclamation the senate convened on May 14, 1872, and on the same day adjourned to May 22d. They sat on May 22d and 23d, and on the last-named day adjourned to June 18, 1872, on which day they met and continued in session, except certain adjournments for holidays and Sundays, until July 12, 1872, on which day they met and adjourned to September 10, 1872, and met on said day and adjourned to November 20, 1872. On or about September 13, 1872, George G. Barnard was removed from the office of justice of the Supreme Court by a judgment of the Court of Impeachment. On September 21st, the governor appointed the defendant, Enoch L. Fancher, as a justice of the Supreme Court in the place of said Barnard. Mr. Fancher took the oath of office and entered upon its duties. As the general election of 1872 took place less than three months after the happening of the vacancy caused by the removal of Judge Barnard, his successor could not be chosen at said election. The governor, in making this appointment, assumed that the senate was not in session within the meaning of the Constitution, and that the power of appointment, without confirmation by the senate, was vested in him. The question, whether the senate was or was not in session at the time in question, is submitted in this action.

Francis C. Barlow, attorney-general, for the appellants. The senate was in session at the time of the appointment. (Cushing's Law and Practice of Legislative Assemblies [2 ed., 1866], §§ 495, 516; Jefferson's Man., 108; 1 Black. Com., 186.)

Amasa J. Parker for the respondent. Such a construction will be given to a constitutional provision as will give it the intended effect and will prevent the evil intended to be obviated. (Potter's Dwarris, 144; *Hart* v. *Cleis*, 8 Johns. R., 44; *People* v. *N. Y. C. R. R. Co.*, 13 N. Y., 81; *Holmes* v. *Carley*, 31 id., 289; *Brown* v. *Barry*, 3 Dall., 365; *McClusky* v. *Cornwell*, 11 N. Y., 601, 602.) When words admit of two senses, each of which is conformable to common usage, that sense is to be adopted which best harmonizes with the nature and object of the provision. (Potter's Dwarris, 656, 662; *Bigg* v. *Penn*, 16 Pet. R., 610; *Cohen* v. *Virginia*, 6 Wheat., 418; *Ogden* v. *Saunders*, 12 id., 332; Story on Const., § 422.) The word "session" means an actual sitting for the transaction of business. (Bouvier's Law Dic., title "Session"; Webster's Dic.; 1 R. S., 154, 155; Session Laws, 1828, page 494.)

ALLEN, J. It is conceded that the vacancy in the office of justice of the Supreme Court, to which the respondent was appointed, occurred on the 13th day of September, 1872, and that, if the senate was not on that day "in session," the appointment of the respondent by the governor, on the 21st of the same month, was authorized by the Constitution. It is also conceded that the senate had not been on any day after the 10th day of September actually assembled as a body, and that it had adjourned on that day to meet again on the 20th of November. The actual sittings of the senate were suspended on the 10th day of September, and the senators could only regularly be assembled or convened with authority to transact any business or perform any act as a senate prior to the day to which the body had adjourned by the governor, under the power conferred upon him, to con-

vene the legislature (or the senate only), on extraordinary occasions (Const., art. 4, § 4), and if "in session," they could not be convened by the governor in another session. The Constitution, art. 6, § 9, declares that a vacancy in the office of a justice of the Supreme Court shall be filled for a full term at the next general election happening not less than three months after the vacancy shall occur; and until any vacancy shall be so filled, the governor, by and with the advice and consent of the senate, if the senate shall be in session, or, if not in session, the governor may appoint to fill such vacancy, which appointment shall continue until and including the last day of December after the election at which the vacancy shall be filled. The governor cannot, without the advice and consent of the senate, if that body is in session, fill a vacancy in the office of justice of the Supreme Court, and the claim of the relator is, that notwithstanding the interruptions of the sittings and the adjournment from September 10th to November, without the possibility of having a regularly organized and constituted senate in actual session, or a senate convened capable of advising or consenting to an appointment during the intervening months by any act or assent of the body itself or the individual senators, the senate was "in session" within the meaning of the Constitution, requiring the assent of that body to the appointment of the respondent to the office, which he holds under the appointment of the governor.

The same general rules which govern the construction and interpretation of statutes and written instruments generally, apply to and control in the interpretation of written Constitutions. They are made by practical and intelligent men for the practical administration of the government, and they are to receive that interpretation which will give effect to the intent of the framers as deducible from the language employed and operate most benignly in the interest of the governed, and best harmonize with and give effect to the general scope and design of the instruments. As in other written instruments, the intent and design of a particular provision being

ascertained from the words used, effect will be given to it in harmony with such intent and design. (Story on Constitution, § 400, and see *McClusky* v. *Cromwell*, 11 N. Y., 601.) If words have a doubtful meaning, or are susceptible of two meanings, they should, within the rule, receive that which will effectuate the intent of the framers of the Constitution and the general intent of the instrument.

It was evidently the design of the Constitution:

First. That the office of justice of the Supreme Court for the full term should only be filled at a general election and by the people.

Second. That it should not be filled at an election happening less than three months after the occurring of the vacancy, that the electors may not be taken by surprise.

Third. That there should be no necessary, actual vacancy for any period of time, certainly for no considerable time, and that the vacancy should be filled temporarily by appointment.

Fourth. That if the senate should be in session, so that their advice could be asked and their consent had by the governor to an appointment, no appointment should be made without such advice and consent.

Fifth. That if the senate should not be in session, so that the governor could communicate with it, he should fill the vacancy without its advice and consent.

Sixth. That the governor should not convene the senate solely for the purpose of submitting nominations for confirmation.

Seventh. That the necessity and expediency of filling the vacancy immediately upon its occurring, or before it could be filled for the full term, should be determined by the governor upon whom the appointing power is conferred, subject to the necessity in case the senate should be in session of having the advice and consent of that body.

The evil to be guarded against by a temporary appointment was a vacancy in an important office, the duties of which cannot be performed by deputy or substitute. The remedy or preventive of the possible evil provided is an appointing

power, capable of acting at all times and in any emergency, viz., the governor alone, if the senate is not in session; and the governor and senate, if that body is in session.

The Constitution provides against a vacancy for the briefest period, even the three months which must intervene between the happening of a vacancy and an election to fill it; and so far as practicable, effect should be given to the evident design of the provision by giving a practical interpretation of the language employed. But little aid will be derived by a resort to lexicographers for the technical meaning of the word "session" with a view to determine what was understood and intended by the words "in session," as applied to the senate in that part of the Constitution under review. Indeed, the science of words alone cannot control in the construction of a written constitution, which must be rather interpreted with reference to its special and general intent and the ordinary and usual sense of the phraseology than to the literal and technical meaning of the words used.

To give the phrase, "in session," the effect claimed for it by the relator, and to hold that the senate is now and has been from the 14th of May "in session," within the meaning of the Constitution, so that no appointment to fill a vacancy in the office of justice of the Supreme Court occurring during that time can be made, except by and with the advice and consent of the senate, practically nullifies the provision and defeats the remedy intended to be provided for the possible evils resulting from a vacancy in the office by making an appointment impossible for several months at a time.

The Senate adjourned on the 10th of September to meet again on the 20th of November. To declare, by resolution, on the 10th day of September that their next meeting should be on a future day, several weeks distant, and to adjourn to that day, was virtually to declare that the senate would not be in session, the senators would not assemble or meet in a body in the interim. Nothing is proved by saying, in conformity with the definition of the term "session," as given

by Bouvier and other lexicographers, that the extraordinary session of the senate, which commenced on the 14th of May, when it was convened by the governor, still continues and will only end when it shall finally adjourn *sine die*, or by the meeting of the senate at the commencement of the next annual session of the legislature.

The session of the senate, like the sessions of the legislature or of congress, or the term of a court, continues, notwithstanding repeated recesses or adjournments, until the final close or end in some way provided by law. It is true that should the senate not come together pursuant to the adjournment, and so the session fail (and that that will not be the case cannot now certainly be known), a question would arise whether the session did not in fact terminate on the 10th of September, the day of the last adjournment. This question may never arise, but it illustrates the difficulty of holding that the senate was "in session on the 13th or 21st days of September." The term, as thus used, conveys a distinct idea of the time within which a body has a continuing existence for certain purposes, not affected by adjournments from day to day or from time to time. The legislature holds ordinarily but one session, known as the annual session, and it may be continued by adjournment over intervening months, and yet the session will be the same.

The word "session," as thus used, conveys a distinct idea, and indicates a period or term of time in the abstract, while the words "in session," as used in the clause under review, indicate a present acting or being of the senate as a body.

The Constitution does not forbid the appointment by the governor alone "during a session of the senate," but only when the senate "is in session." The word "session" may mean the actual sitting of a court or legislative body, or the time during which a court or legislature meet for the transaction of business, and the connection in which it is used must determine its meaning as used. When it is said that a court or legislative body is in session, the meaning is that the members are assembled for business. It is not

denied that a single "session" may be interrupted and consist of several actual sittings, with weeks or months intervening. In that case the session will be continued over the intervening time, and the several sittings will be connected together as one session by the adjournments. Although the months between the several sittings will be between the commencement and the final termination of the session, in no proper sense will they be included as a part of the session. They are only constructively, if at all, a part of the session. While the session substantially continues adjourned from day to day, or over holidays, or with brief and usual recesses, so that the session is practically continuous, the body might possibly be regarded as practically in session during such recesses. That need not be considered. But when the sittings are terminated by an adjournment for months, and the actual meeting or sitting of the body thus interrupted, although the session is continued, it cannot be said that the body is "in session." The spirit and intent of the Constitution would be sacrificed to what is claimed to be the letter of the instrument, to hold that the senate was "in session" during all the months during which it might adjourn, and thus extend an ordinary or extraordinary session.

The Constitution, designed for practical purposes, had respect to realities, and was not dealing with fictions or a constructive condition of things. It had respect to a senate actually and duly convened, and in readiness to act upon the nominations of the governor and the transaction of other business pertaining to that body, and not to a constructive session a body not actually or potentially existing. It was not intended for a condition of things when as in this case, the senate was not actually convened, and when it was not to convene for months to come, and when a call of the executive would be necessary to enable that body to advise in reference to the nominations.

It is not intended to intimate an opinion beyond this case. Although the provision applies to all sessions, the framers of the Constitution only had in mind the annual sessions of the

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senate as a constitutional branch of the legislature which are ordinarily and substantially continuous, are not of long duration, and the terms they have used are more peculiarly applicable to the condition of things during such session. It was not contemplated that an extraordinary occasion would arise when the senate as an independent body would be in session for weeks at a time at intervals and continuing their session by long adjournments during the year. It is very palpable that it is not the intent of the Constitution that the senate should be regarded as "in session" during these long adjournments, or that any such constructive session or sitting should deprive the governor of the right to fill the vacancy or the people of the services of a justice of the Supreme Court. The judgment should be affirmed.

All concur except PECKHAM, J., not voting.

Judgment affirmed.

J. HOLBROOK CUSHMAN, Appellant, *v.* RACHAEL A. BRUNDRETT et al., Respondents.

Upon appeal from an order which may have been matter of discretion the appellant must show that it was made upon a ground that did not authorize the court to exercise any discretion; otherwise the appeal will be dismissed.

The time to appeal in cases coming under the fourth subdivision of section 11 of the Code is not limited. (PECKHAM, J.)

(Argued November 12, 1872; decided November 19, 1872.)

MOTION to dismiss appeal from order of the General Term of the Supreme Court in the first judicial department, affirming an order of Special Term setting aside an inquest. The facts and grounds of motion appear in the opinion.

William Watson for the appellant.

R. W. Townsend for the respondents.

Opinion of the Court, per PECKHAM, J.

PECKHAM, J. Motion to dismiss appeal on the ground that the order involved discretion, also that it was not taken in time. The plaintiff took an inquest in May, 1870. This was set aside by an order at Special Term in first district, Supreme Court, with ten dollars, costs to abide event. The motion was made for irregularity and on the merits. The plaintiff appealed from that order to the General Term of that department. That appeal was decided against him, and after the expiration of more than sixty days from receiving written notice of that last order he appeals to this court. The defendants now move to dismiss the appeal to this court, insisting that that order was not appealable. It is clear that if the order setting aside the inquest was granted upon the merits, then, as it involved the exercise of a discretion, it was not appealable. There is nothing in the papers showing the ground upon which it was made.

If it were granted for irregularity, as the motion was confessedly made in time, it surely should have been granted with costs. This is substantially a universal rule as to irregularity.

If it were granted upon the merits, the rule is almost as universal (not quite) that it should have been upon payment of costs.

This order does neither. It neither grants costs against plaintiff as for an irregularity nor requires their payment to him as for a favor if upon the merits.

The *onus* is upon the appellant to show that the order was made upon a ground that did not authorize that court to exercise any discretion in its decision. Otherwise the appeal should be dismissed.

It is impossible to make a reasonable guess as to the ground upon which this order setting aside the inquest was made. So far as the case shows, it may have been granted upon either, and this court cannot be called upon to speculate as to which was the real ground. As it may, therefore, have been granted upon the merits, this appeal must be dismissed with costs. (Code, § 11, sub. 4.)

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It is not necessary to decide the other point. But I find no provision in the Code, and we have been referred to none, limiting the time to appeal in cases of appeals under the fortieth subdivision of section 11. Section 331 does not embrace them.

The appeal must be dismissed, with costs.

All concur.

Appeal dismissed.

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IN THE MATTER OF PROVING THE LAST WILL AND TESTAMENT OF JOHN KELLUM, Deceased.

The provisions of the Revised Statutes, authorizing the next of kin within one year after probate of a will of personal property to contest the probate (2 R. S., 61, §§ 30–39), are not confined to wills relating solely to personal property, but are applicable to those proved as wills of both real and personal property.

These provisions are not abrogated by the provisions of the act of 1837 (chap. 460, Laws of 1837), which require the same proof and proceedings for the probate of wills of personal as of real property, and which dispense with the separate recording of the instrument as a will of personal property after it has been recorded as a will of real property.

In case the probate of a will as a will of personal property is revoked, if it has also been proved as a will of real estate, the effect of that probate is not impaired. Notice to devisees is, therefore, unnecessary.

(Argued November 12, 1872; decided November 19, 1872.)

APPEAL by Hiram Kellum, one of the next of kin of John Kellum, deceased, from an order of the General Term of the Supreme Court in the second judicial department, affirming an order of the surrogate of Queens county, vacating an order to show cause and citation and proceedings for revocation of probate of the will of said John Kellum, which had been formerly proved and recorded before the said surrogate as a will of real and personal property. (Reported below, 6 Lans., 1.)

The will of John Kellum was admitted to probate and recorded by the surrogate, upon due notice to all the next of kin and heirs, as a will of both real and personal property, on

the 25th of September, 1871. Hiram Kellum, one of the next of kin cited, filed in February, 1872, with the surrogate, his allegations against the validity of the will; an order directing a citation to issue was entered thereon, and a citation was issued to Hannah Kellum, the executrix and legatee, to show cause why the probate should not be revoked. Upon the return of this citation the surrogate ordered the order and citation to be vacated and set aside and the proceedings dismissed upon the ground of want of jurisdiction.

Philip S. Crooke for the appellant. The surrogate had jurisdiction of the allegations. (2 R. S., 61.) The probate of the will was effective as of a will of personal property. (Laws of 1837, chap. 460; 2 R. S., title 1, chap. 6, §§ 10, 11, 12, 14, 15; *Vanderpoel* v. *Van Valkenburgh*, 6 N. Y., 190; Burrill's Law Dictionary, "Will;" *Campbell* v. *Logan*, 2 Bradf., 90, 94; Willard on Executors, 63; *Collier* v. *Idley*, 1 Bradf., 94; *Mason* v. *Jones*, 2 id., 181, 325.)

Samuel Hand for the respondent. The surrogate had no jurisdiction to revoke the probate of this will after it was proved and recorded as a will of real and personal estate. (2 R. S., 57, 70, Edm. ed.; 2 id., 57, §§ 7–15, 1st ed.; 2 id., 60, §§ 24, 26, 29, 1st ed.; Revisers' notes, 5 R. S., 368, Edm. ed.; 2 R. S., 66, § 55, 1st ed.; Laws of 1837, pp. 525, 529.)

RAPALLO, J. A will may be proved at one and the same time, both as a will of real and personal property. The effect of the probate differs, however, as to each class of property. As to the real estate, the probate is not conclusive either as to the validity or due execution of the will. These questions may be litigated whenever rights to real estate claimed under the will are controverted. But in respect to dispositions of personal property contained in the will, the rule is different. Its admission to probate as a will of personal property is conclusive as to its validity until such probate be reversed on appeal or revoked by the surrogate, in the manner provided by the statute, or the will be declared void by a competent tribunal. (2 R. S., 61, § 29; 6 N. Y., 190; 1 Bradford, 94).

It was in consequence of this conclusive effect of the probate that the provisions were adopted which permit the next of kin, within one year thereafter, to contest the same by filing allegations against the validity of the will or the competency of the proof thereof. (2 R. S., 61, §§ 30 to 39; Reviser's notes, 3 R. S., 630.)

These provisions are an important safeguard against imposition or mistake, and afford the next of kin a whole year after the probate, to investigate the circumstances attending the execution of the will. No such provisions are necessary as to wills of real estate, as the probate may be repelled at any time by contrary proof. (2 R. S., 58, § 15.)

In case the probate of the will as a will of personal estate is revoked, the revocation is made by the entry thereof in the records of the surrogate, and notice being given, as prescribed by the statute. The record of the will remains, and if it has also been proved as a will of real estate, the effect of that probate is not impaired by the revocation of the probate as a will of personal property. That revocation simply divests the probate of its quality of a probate of a will of personal property. Notice to devisees is therefore unnecessary.

The position taken on the argument, that the provisions authorizing this revocation apply only in case the will relates solely to personal property, or be proved solely as a will of personal property, and that they do not apply where it has been proved as a will of both real and personal estate, is not sustained by any sound reason. If such were the true construction of the statute, but few cases could arise in which it would be available. The same instrument ordinarily disposes of both real and personal estate, and possesses a double character. In so far as it relates to personal property, it is a will of personal property, and all provisions of law relative to that description of will apply to it. If those provisions were applicable only to wills exclusively of personal property, then the sections relative to granting letters testamentary would be inapplicable where the will was proved as a will of real and personal property, for they are to be granted only when

a will of personal property is admitted to probate. (2 R. S., 69, § 1. See also *Mason* v. *Jones*, 2 Bradf., 181, 325.)

The provisions of the act of 1837, which require the same proof and proceedings for the probate of wills of personal property which are required as to wills of real estate, and which dispense with the separate recording of the instrument as a will of personal property after it has been recorded as a will of real estate, do not abrogate the provisions of the Revised Statutes allowing allegations to be filed. The legislature has not declared such to be the effect of the act of 1837, nor are its provisions inconsistent with those of the Revised Statutes. The act of 1837 throws additional protection around the original probate, but is not an equivalent of the right to a new probate within a year. Neither does it deprive the probate of its conclusive effect so far as concerns the personal property. (6 N. Y., 190.) In the allegations the contestant describes himself as heir-at-law as well as next of kin, and the citation was to show cause why the probate should not be revoked, instead of being limited to the probate as a will of personal estate. These inaccuracies, however, would not prevent the surrogate from confining the hearing, and his adjudication within the limits authorized by the statute, and did not justify a dismissal of the whole proceeding.

The order of the General Term and that of the surrogate, made March 21, 1872, should be reversed, with costs, to be paid *de bonis testatoris*, and the surrogate should proceed with the hearing of the proof.

All concur.

Order reversed.

Statement of case.

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ISAAC HEATH, Appellant, v. WALTER BARMORE, Respondent.

The rule of the common law, that real estate held by a corporation at the time of its dissolution reverts to the grantor, does not prevail in this State in respect to stock corporations. Where lands are conveyed absolutely to a corporation having stockholders, no reversion or possibility of a reverter remains in the grantor.

A corporation organized under the plank-road laws of this State is authorized to take, by purchase, the entire fee of lands needed for its road, and no condition or qualification of the grant will be implied in an absolute conveyance to it in fee. The grantor retains no property therein which will prevent a division of the property among its stockholders or which will preclude the State, with the assent of the company, from diverting the land to other public uses, or from declaring by law that a surrender of any part of the road by the company shall operate to transfer the title of the company to the town in which the land is so located.

The provisions of the act of 1854 in relation to plank-roads, etc. (chap. 87, Laws of 1854), which authorize a plank-road company to surrender all or any portion of its road, and provide that in such case the portion surrendered shall cease to belong to the company, and shall revert and belong to the several towns, etc., make such surrender equivalent to an alienation by the company, and embrace as well lands which never before belonged to the towns as those which were public highways when acquired by the company, and the act cannot be assailed upon the ground that it takes the property of the grantor to the company for public use without just compensation.

(Submitted November 15, 1872; decided November 26, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the eighth judicial district, affirming a judgment entered upon the decision of the court upon a trial at circuit without a jury.

This was an action of trespass. In January, 1852, the Fredonia and Sinclairsville Plank-road Company was organized for the purpose of constructing a plank-road from the village of Fredonia to the north line of the town of Ellicott. The company surveyed their road and run it across lands in the possession of Rufus Pratt, and also across lands in the possession of the plaintiff, where previously there had been no highway. The plaintiff at the time was in possession of 100 acres of land, through which the road was to run, to fifty acres

of which he had title. The title to the residue was in the heirs of James Heath, his father. Pratt was in the possession of thirty acres north of and adjoining the land possessed by plaintiff. He held this under a contract with James Heath for the purchase thereof, and had paid about one-third of the purchase-money. The title to this land was in the heirs of James Heath.

In 1852 Pratt conveyed to the company, their successors and assigns, so much of his land as should be selected for the site of their road, being a strip four rods in width. The plaintiff also conveyed to the company a strip of his land four rods in width. These deeds were recorded in the clerk's office of Chautauqua county in June, 1863. Soon after obtaining these deeds, the company constructed their road across these lands in the possession of Pratt and the plaintiff.

In 1856 Pratt, who had paid the purchase-money, but had not taken a deed, sold his interest in the thirty acres to the plaintiff. He gave no conveyance on this occasion, merely surrendering the papers he had received from Heath. Soon after this, the heirs of James Heath conveyed to the plaintiff 128 acres of land, including the fifty acres which had previously been conveyed to him and the thirty acres which had been in the possession of Pratt.

In November, 1859, proceedings were had by the company for the abandonment of a portion of their road, including the land acquired from Pratt and the plaintiff as aforesaid. Soon after the abandonment the plaintiff proceeded to exercise acts of ownership over the land so conveyed and to obstruct the travel over it. His obstructions were removed by the town authorities.

In the spring of 1865 a bridge across a slough was removed by high water, and the timber and plank of which it was composed carried down stream. A portion of these materials were deposited on the plaintiff's land. The defendant, by direction of the town authorities, hauled the timber and plank back again across the plaintiff's fields, he forbidding their doing it. In July, 1866, plaintiff fenced up that part of

the road which crosses his land at both ends. The fences were thrown down by defendant and travel resumed. The plaintiff then commenced an action in a Justice's Court for trespass. The defendant pleaded title in the town, whereupon the action before the justice was discontinued and this action commenced. The judge found the following conclusions of law: 1st. That the Fredonia and Sinclairsville Plank-road Company, through the deeds executed by Pratt and the plaintiff, acquired the right to use the lands described in those deeds for the purpose of their road during the period embraced in their charter. 2d. That on the abandonment of their road by the company in 1857 their rights in those lands, by virtue of the provisions of chap. 87 of the statute of 1854, passed to the town of Gerry, and belong to that town. 3d. That the plaintiff cannot recover for any acts done by the defendant within the strip of land four rods in width embraced in the deeds given by him and Pratt to the said company. 4th. That the defendant trespassed upon the lands of the plaintiff outside of the limits of the former plank-road, but now highway, when he entered thereon to remove the bridge materials to their former position, and adjudged that the plaintiff should recover his damages for such trespass, which he found to be three dollars. Judgment was entered accordingly.

A. Hazeltine for the appellant. By the abandonment of the road the town acquired no right to the land, except such as had previously been a highway. (*The Presbyterian Society of Waterloo* v. *The Aub. and Roch. R. R. Co.*, 3 Hill, 567; *Fletcher* v. *The Aub. and Syr. R. R. Co.*, 25 Wend., 462; *Bloodgood* v. *The Mohawk and H. R. R. Co.*, 18 id., 1; 12 id., 371; 24 N. Y., 658; *Williams N. Y. C. R. R. Co.*, 16 id., 97; 7 John., 477; 18 id., 238; 3 Barb., 306; *McManus* v. *Butler*, 49 id., 176.) On the abandonment of the *locus in quo* of the road, the land reverted to the original owners. (*Hooker* v. *U. & M. Turnpike Co.*, 12 W., 371; 1 R. S., 723, 1st ed.; 3 R. S., 11, 5th ed.; 12 Wend., 371–373;

3 Hill, 567; *Williams* v. *N. Y. C. R. R. Co.*, 16 N. Y., 97; *Mahon* v. *N. Y. C. R. R. Co.*, 24 id., 658; *People* v. *The Comrs. of Palatine*, 53 Barb., 70; *People* v. *Lawrence*, 54 id., 589.)

C. R. Lockwood for the respondent. Upon the abandonment of the road the land belonged to the town for a public use. (16 N. Y., 108, 109; *Benedict* v. *Goit*, 3 Barb., 465; *Walker* v. *Caywood*, 31 N. Y., 51; 14 id., 516; *Craig* v. *and Roch. City and Brighton R. R. Co.*, 39 id., 404; *People* v. *Kerr*, 37 Barb., 357; 3 Stat. at Large, 549; *Fletcher* v. *Peck*, 5 Cranch, 87; *Morris* v. *People*, 3 Den., 381; 3 Seld., 109; Laws 1854, chap. 87, p. 167.) The reversionary interest to Pratt and plaintiff lasted only while the company had the lands. (5 Den., 389; 2 Kent, 282; 5 Den., 389; 1 R. S., 599, § 1; 12 N. Y., 135.)

RAPALLO, J. In so far as the plaintiff's right to recover in this action is sought to be sustained, on the ground that at common law real estate held by a corporation at the time of its dissolution reverts to the grantor, it cannot be supported for two reasons: First, because the plank-road company has not been dissolved, and secondly, because the rule of law invoked by the plaintiff does not prevail in this State in respect to stock corporations. Under the provisions of 1 R. L., 248, and 1 R. S., 600, §§ 9 and 10, upon the dissolution of a corporation, the directors or managers at that time become trustees of its property (unless some other custodian is appointed), for the purpose of paying the debts of the corporation and dividing its property among its stockholders; and these provisions apply as well to the real as to the personal property of corporations. (*Owen, Receiver*, v. *Smith*, 31 Barb., 641; 2 Kent Com., 307 and 308; notes 371 and 372 of 11th ed.; Angell & Ames on Corporations, § 799, *a*, 5th ed.; 46 Barb., 365.) Consequently, where lands are conveyed absolutely to a corporation having stockholders, no reversion or possibility of a reverter remains in the grantor.

Opinion of the Court, per RAPALLO, J.

The conveyances to the plank-road company in this case appear to have been absolute conveyances—no condition or limitation of the estate seems to have been contained in them, and they therefore passed the whole estate of the grantor. (2 R. S., 748, § 1.)

The plaintiff contends, however, that these conveyances having been made to a plank-road company, the estate granted must be deemed to be limited to that required for the purposes of a plank-road, and the devotion of them to those purposes is an implied condition or qualification of the grant, and in support of this position he cites *Jackson* v. *Hathaway* (15 Johns., 447); *Matter of John and Cherry Streets* (19 Wend., 659 and 675); *Hooker* v. *Utica Turnpike Co.* (12 id., 371); *Mahan* v. *N. Y. Central R. R.* (24 N. Y., 658); 3 Hill 568; 25 Wend., 462; 18 id., 9.)

It did not appear in either of the cases cited that there had been any conveyance by the owner of the soil to the corporation. They are all cases of lands taken for streets or highways, or by turnpike companies who were authorized to take lands necessary for the construction and operation of their roads, at an appraised value; and they hold that, as to lands taken for highways, the public acquires only an easement, leaving the fee in the original owner, and that as to lands taken by turnpike companies, although the acts declare that they shall be held by the company, its successors and assigns forever, it acquires only such interest as is necessary for the public use for which the lands are taken; that when that use ceases, the lands revert, and that an additional burden, such as a steam railroad, cannot be imposed upon them by law, without making further compensation to the owner of the fee.

These cases decide only what was the legal effect of a taking of land *in invitum* for highways, or under the provisions of the turnpike act, but do not determine the effect of a voluntary conveyance by an individual to a corporation capable of taking land by purchase. Even a turnpike company may

by grant acquire lands in fee and convey an indefeasible title to a purchaser. (*People* v. *Mauran*, 5 Denio, 389.)

The plank-road act (Laws of 1847, chap. 210, § 28) provides expressly, as to land taken by legal proceedings, that it shall be held so long as it shall be used for the purposes of the road. But no such provision is made with respect to lands acquired by purchase. The amended act (Laws of 1847, chap. 398, § 1) declares, that any company formed under the previous act may procure, by purchase or gift from the owners thereof, any land necessary for the construction of the road, and is silent as to the tenure. So far from gathering from this any intention to extend the limitation of the tenure to lands thus purchased, it would rather indicate the intention to leave that matter to the agreement of the parties, when the lands are acquired by private purchase. When a plank-road is sold under execution, it is provided by the act of 1857 (chap. 482) that a new corporation may be formed by the purchaser and others, for a term not exceeding the unexpired term of the original incorporation. This, however, is only a limit upon the duration of the franchise. It would not prevent the company during its existence from aliening in fee land which it held in fee, or preclude the division of such property among its stockholders on dissolution.

The act of 1859 (chap. 209, § 2) authorizes plank-roads to purchase, take and hold lands necessary for branches, etc., and also to enter upon and take, by legal proceedings, the lands of any person necessary for like purposes. But as to lands which they shall legally enter upon and take by virtue of the act, and those only, their tenure is limited to so long as such lands shall be used for a road. (§ 8.) In this respect, all the acts are in harmony.

As to the land of which the plaintiff held the legal title at the time of his conveyance to the plank-road company, that conveyance passed all his estate and interest in the land. The price paid by the company must be deemed to be the consideration for the entire fee, and he consequently retained no property therein which would preclude the State, with

the assent of the plank-road company, from devoting the land to other public uses, though they should impose greater burdens upon it than a plank-road, or even from declaring by law that a surrender of any part of the road by the company, in the form prescribed by the act, should operate to transfer the title of the company to the town. (See *Heyward* v. *Mayor, etc.*, 7 N. Y., 314.) The words of the act of 1854 (chap. 87, § 1), which declare that the portion surrendered shall "cease to be the property of the company and revert and belong to the several towns," etc., are, we think, sufficient to make the surrender equivalent to an alienation by the company, and broad enough to embrace lands which never before belonged to the towns, as well as those which were, when acquired by the company, public highways. The act of 1854, under which the defendant justifies, cannot therefore be successfully assailed on the ground that it takes property of the plaintiff for public use without just compensation.

These views dispose of the case so far as the lands of which the plaintiff held the legal title, at the time of his conveyance to the company, are concerned.

As to those which at the time of that conveyance were in his possession, but the title whereto was in the heirs of James Heath, his conveyance passed to the company, at the least, the legal title to an undivided share, it appearing by the finding that James Heath was his father. His contract with Pratt also conveyed to the latter an equitable title to a like undivided share in the thirty-acre lot; and that share in the lands embraced in Pratt's conveyance, passed from him to the company. Pratt's payment of the purchase-money clearly entitled his grantee to the possession of that undivided share. Consequently, without considering the effect of the title to the other shares which the plaintiff acquired from his co-heirs, subsequently to the conveyances to the company, and even supposing that such title did not inure to the benefit of the company, the company, or those claiming through it, were, at the time of the alleged trespasses, at least tenants in common

Statement of case.

with the plaintiff, and for that reason he could not maintain trespass against them for acts of the character established by the findings.

That consideration was sufficient to defeat the action, and the judgment must therefore be affirmed, with costs.

All concur.

Judgment affirmed.

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SEYMOUR N. MARSH, Appellant, *v.* EDWARD ELLSWORTH et al., Respondents.

In proceedings by one C. for his discharge in bankruptcy, defendant, E., a creditor, opposed his discharge upon the ground that he was a partner in the firm of M. & Co., and had fraudulently omitted from his inventory his interest in the property of said firm. Plaintiff, a member of said firm, was called as a witness by the defendants upon the hearing before the register. Plaintiff's testimony tended to show that C. was not a member of the firm. Defendant, C., as attorney for E., filed objections to the discharge; among others, one charging the bankrupt with procuring plaintiff to testify falsely as to who were the partners in the firm, and as to the connection of the bankrupt therewith. In an action of libel,—*Held*, that the question as to whether the evidence of plaintiff was true or false was material and pertinent; that defendants were not precluded by the fact that plaintiff was called as a witness by defendant, E., from insisting that his testimony was false; and that the publication was privileged.

(Argued November 18, 1872; decided November 26, 1872.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order overruling plaintiff's exceptions and directing judgment upon a verdict for defendants.

This was an action of libel. The alleged libel and the facts connected with its publication sufficiently appear in the opinion.

The court upon trial directed a verdict for defendants, to which plaintiff duly excepted, and verdict was rendered accordingly.

Ira D. Warren for the appellant. Privileged communications of parties and attorneys are limited to matters which are pertinent and material. (*Gilbert* v. *People*, 1 Den., 41; *Ring* v. *Wheeler*, 7 Cow., 725; *Suydam* v. *Moffatt*, 1 Sand., 463, 464; *Wright* v. *Woodgate*, 2 Crom., W. & R., 573; Pleas of the Crown, 2, p. 128, § 8.) The court erred in not submitting the question to the jury. (*White* v. *Carroll*, 42 N. Y., 161; *Suydam* v. *Moffatt*, 1 Sand., 463, 464; *Hastings* v. *Lush*, 22 Wend., 414; *Fowles* v. *Bowen*, 30 N. Y., 26.)

Wm. C. Clifford for the respondents. The words used were pertinent and material, and it was unnecessary for defendants to deny the allegation of malice. (*Garr* v. *Selden*, 4 Comst., 91; *Hastings* v. *Lush*, 22 Wend., 410; 36 How. Pr., 532, 537.)

GROVER, J. The alleged libel was matter included in the objections filed by the defendant, Coursen, as counsel for the defendant, Ellsworth, to the discharge from his debts of George Caldwell with the register in bankruptcy, to whom the matter had been referred by the court upon the petition of Caldwell for his discharge. Upon the hearing of the reference, Ellsworth, an opposing creditor of Caldwell, sought to prevent the discharge of Caldwell by showing that he was a partner in the firm of Marsh & Co., and, as such, entitled to an interest in the property of the firm, which he had fraudulently omitted from the inventory of his property. Caldwell insisted that he was not nor ever had been such partner; but that from 1850 to 1854 one Read, his father-in-law, was the partner of the plaintiff in the business carried on; and that in the latter year Read transferred his interest to his (Caldwell's) wife, who since had been the partner of the plaintiff; during all of which time he had been employed by Read and his wife to aid in carrying on the business at a salary of $5,000 a year, which salary he had drawn and expended in the support of his family. The defendant, Ellsworth, introduced the plaintiff as a witness, who gave testimony tending

to sustain the position of Caldwell. The alleged libel was in the third objection to the discharge filed by Coursen, as counsel on behalf of Ellsworth, the opposing creditor, as follows: "And the said creditor (Ellsworth) charges the said bankrupt with procuring his wife and Marsh (the plaintiff) to testify falsely, in the course of their examination in the proceedings, in regard to material facts in relation to the proceedings, in inducing said Marsh to testify that the said bankrupt was only a salaried employe of said Marsh & Co., and that the share of the business assets and property of said firm, which in truth and fact belonged to the bankrupt, had, prior to 1854, been the property of one Joshua Read, and since 1854 had been and now is the property of said Eleanor J. Caldwell." It is obvious that the design of this objection, if made in good faith, was to induce a belief in the referee that the testimony of the plaintiff was false and perjured, and should be so regarded in determining the case. The fact that the bankrupt was charged with suborning him to give false testimony is not material, as his criminality (if guilty) consisted in knowingly giving false testimony; and this would not be at all aggravated by having done it by the persuasion of the bankrupt. This suggestion was probably made in the belief of Coursen that the statement would be more readily credited by assigning this motive. The fact that the plaintiff was introduced by Ellsworth is equally immaterial; as a party introducing a witness, though precluded from giving evidence impeaching his character, is nevertheless at liberty to prove that his testimony is untrue, either from mistake or intentional falsehood, and so to insist to the tribunal, whose duty it is to determine upon the credibility of the testimony. The question is whether this publication was privileged. The law is well settled that a counsel or party conducting judicial proceedings is privileged in respect to words or writings used in the course of such proceedings reflecting injuriously upon others, when such words and writings are material and pertinent to the questions involved; and that, within such limit, the protection is complete, irrespective of the motive with

which they are used; but that such privilege does not extend to matter, having no materiality or pertinency to such questions. (*Gilbert* v. *The People*, 1 Denio, 41; *Hastings* v. *Lusk*, 22 Wend., 410; *Ring* v. *Wheeler*, 7 Cowen, 725.) This is necessary to a thorough, searching investigation of truth. Should those engaged in the management of causes before courts be placed in fear of prosecutions for slander for reflections cast upon the credibility of parties and witnesses, and their defence made to depend upon the truth of what is said, trials of questions of fact, depending upon the credibility of witnesses, would be far less likely to lead to as correct results as in cases where no such embarrassment was felt. In the latter, the court and jury will have their attention called to every consideration having a tendency to enable them to arrive at the truth. This tends to promote an intelligent administration of justice. To secure this is of much greater importance than to prevent the evils arising from reflections cast upon parties or witnesses. Such reflections, if unfounded, produce no lasting injury, as their injustice will almost invariably be made apparent during the trial, and those only injured who have resorted to their use without any substantial ground therefor. Besides, the proper exercise of the powers of the presiding judge will, in most if not in all cases, prevent any abuse of this privilege. The privilege under consideration, it will be seen, is much more extensive than in many other cases where communications are termed privileged, as in giving the character of servants, etc. In the case of counsel, everything pertinent and material to the question involved is privileged, irrespective of the motive. (See cases, *supra*.) In the latter, the extent of the privilege is to repel the presumption of malice which the law implies from making the communication when there is no privilege, and bar a recovery in the absence of proof of express malice. *Wright* v. *Woodgate* (2 Crompton, Meeson & Roscoe, 573), cited by the plaintiff's counsel, was a case of the latter class; and all that is there said by the judge related to this class only, and has no relation to the extent of the privilege of

members of the legislature in their deliberations or of counsel in the trial of causes. *White* v. *Carroll* (42 N. Y., 161), rightly understood, is in harmony with the other cases. The case shows that the court held that the answer given to the question put to the defendant as a witness before the surrogate was not material and pertinent to the inquiry; and further held it was privileged if the defendant, when he gave it, in good faith believed it was; and whether he so believed was a question of fact to be determined by the jury. Had the evidence proved that the answer was material and pertinent, the court must have held it privileged, irrespective of the defendant's belief upon the subject. Applying the law to the present case, we find that the evidence proved that the point in issue before the referee was whether Caldwell, the bankrupt, was a member of the firm of Marsh & Co., and, as such, entitled to a share of the property of the firm. The testimony of the plaintiff was to the effect that he was not such partner, but that his wife was. It was therefore a material and pertinent question whether this testimony was true; and the counsel of the opposing creditor was therefore privileged in insisting, in his objections to the discharge, that it was not true, even if it was necessary for the defendant in this case to go further, and show that there was some reason for the imputation upon the plaintiff, that was shown. It was proved that Caldwell had been engaged for some ten years in the business of the firm; that he managed its financial business, drew the checks, in short, acting the same as if a partner. While this did not satisfy the referee that he was such, and that the plaintiff's testimony was false, it furnished ground to the counsel to argue to that effect.

The judgment of the General Term, affirming the judgment for the defendants, must be affirmed.

All concur.

Judgment affirmed.

Statement of case.

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THE VERONA CENTRAL CHEESE COMPANY, Appellant, *v.* JOSEPH P. MURTAUGH, Respondent.

A penal statute will not be extended by implication or construction to cases within the mischief if they are not at the same time within the terms of the act fairly and reasonably interpreted.

The intent of section 1 of the act to protect butter and cheese manufacturers (chap. 36, Laws of 1865), which imposes a penalty upon any person who shall knowingly sell, supply or bring to be manufactured to any cheese manufactory diluted, adulterated or skimmed milk, is to punish only for actual and intentional violation of its provisions. A party sought to be charged is only liable where the offence is committed by his authority or with his knowledge and assent.

Actual knowledge of the deteriorated quality of each or any particular delivery need not be shown or express authority to dilute, adulterate or depreciate the quality of the milk in any particular manner or to any particular extent. It is sufficient to prove knowledge by the defendant that his servants and agents did deliver bad milk or a general authority to them to do so. This knowledge or authority may be implied from circumstances.

Defendant was at and about his farm managing and controlling it. His servants prepared and delivered at plaintiff's factory diluted and skimmed milk. *Held*, that the evidence, unrebutted by proof that defendant had no knowledge and was in no way accessory to the acts complained of, raised a presumption of fact that they were authorized by him, and required the submission of that question to the jury. A nonsuit was, therefore, error.

(Argued November 15, 1872; decided November 19, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order denying a motion for a new trial, and ordering judgment of dismissal of complaint and nonsuit. (Reported below, 4 Lans., 17.)

The action was brought to recover penalties given by chap. 361 of the Laws of 1865 for delivering to plaintiff's factory diluted and skimmed milk.

Defendant lived upon, managed and controlled his farm and the work thereon. His wife, son and daughter milked the cows, prepared the milk for the factory, and delivered it. They delivered watered and skimmed milk. Upon the trial,

at the conclusion of plaintiff's evidence, defendant's counsel moved for a nonsuit upon the ground that the evidence did not show knowledge on the part of defendant of the wrongful acts. The court granted the motion and ordered exceptions to be heard at first instance at General Term.

John D. Kernan for the appellant. One personally innocent is liable for penalties given by statute for unlawful acts of his agents or servants in the conduct of his business. (*Davis et al.* v. *Bemis*, 40 N. Y., 453, note; *Lee* v. *Village of Sandy Hill*, id., 442, 448, 449; *Hern* v. *Nichols*, 1 Salk., 289; 40 N. Y., 454.) The evidence was *prima facie* sufficient to charge defendant. (*Locke* v. *Stearns*, 1 Metc., 562, 563; *Commonwealth* v. *Nichols*, 10 id., 239; *Attorney-General* v. *Sidden*, 1 Cromp. & Jer., 219; Story on Agency, 7th ed., 560, etc., note; Roscoe Cr. Evi., 4th ed., 657, 658.) The rule of strict construction applicable in a criminal action does not apply here. (*Attorney-General* v. *Sidden*, 1 Cromp. & Jer., 225; *Locke* v. *Stearns*, 1 Metc., 563; *Bennett* v. *Judson*, 21 N. Y., 286.)

I. N. Messenger for the respondent. Plaintiff's case was not brought within the statute, and the nonsuit was properly granted. (Hawkins' P. C., Curw. ed., 188, § 16; 1 Bish. Crim. Law, § 250, and notes; 2 East, 641; 10 Serg. & Rawl., 393.) Where the law presumes the defendant's innocence, it presumes the affirmative, and not the negative. (*Williams* v. *East India Co.*, 3 East, 182.) Knowingly means actual, and not constructive, inferential or even presumptive knowledge. (5 Comst., 210; 22 Barb., 662; 21 id., 212; see also 2 Caines, 97.) If an agent's authority can be executed lawfully, it is not to be extended by construction to unlawful acts so as to render his principal liable in a criminal action or an action for a penalty. (*Clark* v. *Nat. Bank*, 3 Duer, 241–249; *Frazer* v. *Freeman*, ALLEN, J., not rep.; 1 Bish. Crim. Law, §§ 392, 393.)

ALLEN, J. A principal is confessedly liable for the acts of

his agent, within the scope of his general authority. A master is responsible for the fraudulent misrepresentation or deceit, as well as for the negligence or other wrongful act of a servant, if committed in the business of his master, and within the scope of the servant's employment, although, in doing it, he departed from or violated the instructions of the master. (*Higgins* v. *Watervliet T. & R. Co.*, 46 N. Y., 23; *Durst* v. *Burton*, 47 id., 167.) So, too, the principal is chargeable with notice to or knowledge by the agent of matters affecting the relation or obligations of the principal to third persons, if the agent has such notice or knowledge at the time he is concerned for and acting in behalf of his principal in the execution of his agency. (*Bank of U. S.* v. *Davis*, 2 Hill, 451; *Weisser* v. *Denison*, 6 Seld., 68; *Dresser* v. *Norwood*, 17 C. B. [N. S.], 466.) This knowledge of the agent is imputed to the principal, and held as constructive notice to him upon general principles of public policy. It is presumed that the agent has communicated the facts within his knowledge to his principal, and if he has not, that nevertheless, the latter having entrusted the agent in a particular business, it is more reasonable that, where one party must suffer by the misconduct of another, he should sustain the loss who has reposed the confidence in the agent, rather than the third person who has given no such confidence.

In the cases suggested, the principal cannot exonerate himself from liability for the acts of his agent by showing that they were committed in violation of his instruction, or relieve himself from the consequences resulting from actual notice or knowledge of the facts communicated to his agent, by showing utter ignorance on his part. The liability is as absolute as if the acts had been performed by the principal in person, or the knowledge of the particular facts had been actually communicated to him.

Within these general rules it is palpable that the defendant is liable to the parties injured by the adulteration or dilution of the milk delivered in his behalf to the factory, for the damages actually sustained, and such liability does not depend

upon the statute, but upon the well established principles of the common law. But this is an action to recover a penalty given by the statute (Laws of 1865, chap. 361), and although the penalty is given to the party injured, the act is penal, and not remedial; that is, it authorizes a recovery within certain limits as to amount, for each offence, without respect to the actual damage caused by the fraud, and is not intended as a cumulative remedy for the loss occasioned by the wrong, or a substitute for the common-law action. It is punitive and penal in its character. Such an act cannot be extended by implication or construction to cases within the mischief, if they are not at the same time, within the terms of the act, fairly and reasonably interpreted. Laws imposing a penalty and giving penal actions must, like other statutes, receive a reasonable construction. While they cannot be enlarged by construction, effect will be given to the intent of the legislature, as deducible from the language employed, but they will not be extended by implication to cases not fairly within the intent, as declared by the words. (*Strong* v. *Stebbins*, 5 Cow., 210.) The act which gives the penalty sued for, only subjects him who shall *knowingly* sell, supply, or bring to be manufactured, to any cheese factory, diluted, adulterated or skimmed milk. It is not the act of selling, supplying or bringing to the factory the milk condemned by the law, that gives the penalty. If so, it would be immaterial whether the owner and proprietor sold or brought the milk in person or by his servants, or the agency of third persons. The act might be regarded as the act of the principal, and he made liable, although done without his personal knowledge or intervention. *Davis* v. *Bemis* (40 N. Y., 453, note) may be conceded to have been well decided.

But the word "knowingly," in the statute now under review, qualifies the acts condemned, and only makes the offence penal when committed by the authority or with the knowledge and assent of the party sought to be charged. The act designedly distinguishes between actual and constructive participation in and assent to the wrongful act, and between

actual or personal, and imputed or constructive notice or knowledge of facts constituting the offence.

The intent of the act is to punish an individual only for an actual and intentional violation of its provisions. The act need not be personally committed by the party charged, but if authorized by him, he is liable for the penalty. Effect cannot be given to the act in its present form, unless it is thus restricted in its application and operation. Upon any other interpretation, the word "knowingly" is of no effect, and has no meaning. It can hardly be claimed that one would be liable for a penalty under a statute like this, even without the word "knowingly," or other like qualification, for delivering, by mistake and in good faith, milk within the condemnations, but of which neither he or any person in his employ had any knowledge; that which might have become diluted or adulterated by accident, or by the malicious acts of strangers. The extent of the liability in such cases would be the damages actually sustained by the parties injured.

A violation of the statute and a right to the penalty, then, can only be established by proof of a delivery of milk of the character named in the act, with the knowledge or assent, or by authority of the defendant. It would not be necessary to prove actual knowledge of the deteriorated quality of each or any particular delivery, or express authority to dilute or adulterate or depreciate the quality of the milk in any particular manner, or to any particular extent.

It would be sufficient to prove knowledge by the defendant that his servants or agents did deliver bad milk, or a general authority to them to do so. And this authority may be implied from circumstances. It then becomes a question of evidence. That milk diluted and skimmed was delivered by the defendant to the factory is not disputed, and that he did so "knowingly," that is, with knowledge of the inferior quality of the milk, and that it had been tampered with, may, like any other material fact, be proved by circumstances. If there was any evidence proper for the consideration of the jury, bearing upon

the question, the cause should not have been taken from the jury by a nonsuit and a dismissal of the complaint.

The evidence is very brief and simple. The defendant, so far as appears, carried on his farm, and was at and about his farm, managing and controlling his business in the ordinary way, during the time of the delivery of the milk to the plaintiff. His wife and children aided him, and performed certain services, and among other things they milked the cows and prepared the milk and put it in cans for delivery at the factory, and a son of the defendant, or some other servant, delivered the milk to the plaintiff.

The wrongful acts alleged were committed, if at all, by the wife and daughter of the defendant in the performance of services in his behalf, and in his interest, and not in the interest of or the agents of any third person. The relation of master and servant existed between the defendant and his wife and children in respect to the preparation and sending the milk to the factory; and it will not be assumed, in the absence of evidence to the contrary, that acts in the course of the service, tending to benefit the defendant, were without his authority. One is liable for the unlawful sale of spirituous liquors on his premises, with his assent, by a servant or agent employed in his business. But the sale by his servant and agent is only *prima facie* evidence of the assent of the employer, and may be rebutted. (*Rex* v. *Almon*, 5 Bur., 2686; *Commonwealth* v. *Nichols*, 10 Met., 259.) In *People* v. *Hulbut* (4 Den., 133) the illegal sale was by the son of the defendant, and the prosecutor was permitted to prove, as an additional circumstance in aid of the presumption that it was by authority of the defendant, that he kept a bar with bottles in it. In *Attorney-General* v. *Siddon* (1 C. & J., 219) a trader was held liable for concealing smuggled goods, the illegal act having been performed by a servant in the conduct of the business, and in the absence of the master. The Lord Chief Baron was of the opinion that the presumption was, unless the contrary was shown, that the act was authorized by the defendant. Other judges regarded the act as *prima*

facie the act of the defendant, and all agreed that the master was at liberty to have produced evidence to rebut the *prima facie* case, but, as said by BAYLEY, B., "in the absence of any evidence to rebut that case, it was rightly left to the jury, and the jury were bound to consider it the master's act." *The Attorney-General* v. *Riddle* (2 C. & J., 493) is in principle very like the case in hand. There a wife was proved to have authority from her husband, a paper maker, to do certain acts in his trade, and she pledged paper which had no proper label or stamp on it. In an action for the penalty incurred under the revenue laws against the husband, the Chief Baron upon the trial directed a verdict for the defendant. The verdict was set aside, upon motion, on the ground that the authority of the wife to do this particular act was a question for the jury.

Authority from the defendant, express or implied, to his servants, to tamper with the milk, will be equivalent to and supply the want of evidence of actual knowledge by him of the improper treatment of the milk in each instance, and if that authority is proved to the satisfaction of the jury, the action is sustained. Like other presumptions of fact or circumstantial evidence tending to prove a fact, it may be rebutted by evidence that the defendant did not in any way authorize it, and had no knowledge of it. But under the circumstances of the case the jury would, upon the evidence unexplained and uncontradicted, have been authorized to find that the acts of the wife and daughters were authorized by the defendant. It was within the power of the defendant to rebut the *prima facie* case made by the plaintiff, if he, in fact, was innocent, but it will not answer to suffer a party to escape the consequences of acts like those complained of, by keeping in the background and putting forward irresponsible agents, and thus secure the benefits and escape the perils of the wrong. The presumption of authority, from the facts proved, is not one of law, and therefore conclusive, but of fact, and it is for the jury to determine whether the evidence warrants it.

A similar principle prevails in the law of libel, to the extent

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that the publisher is *prima facie* liable for libels published by his servants, but it is now well established that he can exonerate himself from liability by showing that he was in no way accessory to the publication. (Roscoe's Cr. Ev., 6th Am. ed., 622, and cases cited.) But it was competent for the defendant here to prove that he had no knowledge, and was in no way accessory to the wrongful acts complained of, or he may insist, to the jury, that the evidence does not establish his guilty knowledge of or complicity with the acts of his wife and daughters. There was, however, competent evidence tending to connect the defendant with the offence, and it should have been submitted to the jury.

The judgment should be reversed, and a new trial granted.

CHURCH, Ch. J., FOLGER, ANDREWS and RAPALLO, JJ., concur.

GROVER and PECKHAM, JJ., concur in result.

Judgment reversed.

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THE PEOPLE ex rel. FRANCIS C. BARLOW, Attorney-General, Appellants, *v.* WILLIAM E. CURTIS, Respondent.

By the Constitution of the United States the whole subject of foreign intercourse is committed to the federal government, and upon all questions relating thereto it alone can speak and act. It has the exclusive power to regulate, provide for and control the surrender of fugitives from justice from foreign countries. The provision, therefore, of the Revised Statutes (1 R. S., 164, §§ 8–11) providing for such surrender is unconstitutional, and a warrant issued by the governor in pursuance thereof is void.

(Argued November 11, 1872; decided November 19, 1872.)

ERROR to the General Term of the Supreme Court in the first judicial department, to review judgment affirming proceedings upon *habeas corpus* of defendant, a justice of the Supreme Court of the city and county of New York, which

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proceedings were brought into the Supreme Court by writ of certiorari. (Reported below, 46 How. Pr. R., 171.)

Carl Vogt, on the 25th day of May, 1872, was in custody of the warden of the city prison of the city of New York upon a commitment to answer an indictment for grand larceny.

Upon the request of the minister of the kingdom of Belgium, who charged that Vogt had been guilty of the crimes of murder, robbery and arson, near Brussels, the governor of this State, upon the day last named, issued his warrant, under the provisions of the law of 1822 (1 R. S., 164, § 8), to the sheriff of the county of New York, reciting the fact that the proof required by the act of 1822 had been produced before him, which proof was set forth in detail, and further reciting the application of the Belgian minister, and directing the sheriff to deliver Vogt to the person designated by the Belgian authorities, to the end that he might be taken to Brussels to be tried for his crimes.

Upon a hearing upon a *habeas corpus*, issued upon the petition of Vogt, brought to inquire into the legality of his detention, defendant discharged Vogt upon the governor's warrant and recommitted him upon the commitment for grand larceny, upon which latter writ he now remains in custody.

It was conceded that there is no extradition treaty between the United States and Belgium.

The discharge was upon the ground that the act of 1822 and the warrant of the governor thereunder are in conflict with the Constitution of the United States, and therefore void.

Francis C. Barlow, attorney-general, for the people. The State of New York has not, in this case, entered into a compact or agreement with a foreign power. (*Holmes* v. *Jennison*, 14 Peters, 540, 571, 572; *Green* v. *Biddle*, 8 Wheat., 92; Duer Treatise on Const. Law, 385.) The States may exercise certain powers until congress has occupied the ground by legislation. (*Sturges* v. *Crowninshield*, 4 Wheat., 122,

195, 196; *Wilson* v. *Black Bird Creek Co.*, 2 Pet., 245; *Houston* v. *Moore*, 5 Wheat., 1–21, 51, 52.) A State has the power to forbid the entrance and to remove from its territory persons considered dangerous. (*City of New York* v. *Miln*, 11 Pet., 102; *Holmes* v. *Jennison*, 14 id., appendix, 616, 618; *Ex parte Holmes*, 12 Vt., 643; *Prigg* v. *Pennsylvania*, 16 Pet., 539, 625; *Moore* v. *Illinois*, 14 How., 13, 18; *In re Washburn*, 4 Johns. Ch., 106.)

William F. Kintzing for the respondent. The attempt of the State to deliver up defendant was unconstitutional and in derogation of the rights of the general government. (1 Am. State Papers, 175; vol. 2 Opinions Attorneys-General, 452, 559; Wheaton's Elements, 171; vol. 6 Opinions Attorneys-General, 85, 432; Wheaton's Int. Law, by Dana, 181; 10 Sergt. & Rawle, 134; *Ex parte Holmes*, 12 Vt., 636; Story on Const., § 1355; *Gibbons* v. *Ogden*, 9 Wheat., 1; Federalist, No. 22; *Holmes* v. *Jennison*, 14 Pet., 572, 573.) The statute and warrant of the governor are in violation of the Constitution of this State. (State Const., art. 1, §§ 2, 6; 1 Black. Com., 135–137; *Taylor* v. *Porter*, 4 Hill, 140; *People ex rel. Baldwin* v. *Haws*, 15 Abb., 119; *Wynehamer* v. *The People*, 13 N. Y., 378; *Commonwealth* v. *Green*, 17 Mass., 534.)

CHURCH, Ch. J. This is a writ of error to review a judgment of the General Term of the Supreme Court in the first judicial department, rendered upon a certiorari, removing into that court certain proceedings had before the respondent, as a justice of the Superior Court of the city of New York, on *habeas corpus*, in the case of Carl Vogt.

The return showed that the prisoner was in custody of the warden of the city prison, upon a commitment by a police justice for grand larceny; and, also, that the sheriff of the city and county of New York was present with a warrant, issued by the governor of the State of New York, for the apprehension and delivery to the authorities of the kingdom

of Belgium of the said Carl Vogt; and the sheriff prayed for an order adjudging that the prisoner be awarded to him.

The warrant of the governor was issued under and in pursuance of a statute of this State, passed in 1822 (1 R. S., 468, 5th ed.), providing for the surrender of fugitives from justice from foreign countries. The question involved is whether this statute is a violation of the Constitution of the United States. The statute provides that the governor may, in his discretion, deliver over to justice any person found within the State who shall be charged with having committed, without the jurisdiction of the United States, any crime, except treason, which, by the laws of this State, if committed therein, is punishable by death, or by imprisonment in State prison. Such delivery can only be made on the requisition of the duly authorized ministers or officers of the government where the crime was committed. The evidence required is such only as would justify the commitment of the accused for trial if the crime had been committed in this State.

The terms of this act are plainly indicative of an assumption of the right to regulate, provide for, and control the surrender of fugitives from justice from foreign countries; and the question presented is whether this is a power reserved to the States, or one which has been conferred upon the federal government, and, if conferred, whether the power is of that nature that it may be exercised by the States concurrently with the general government.

These questions of conflicting claims between the federal and State governments should always be carefully considered, and courts should be astute in settling them according to the true character of the respective governments, and sedulously guard and preserve the rights and powers of each. The highest interests of the States are promoted by yielding to the general government and protecting it in the enjoyment of unquestioned control over the subjects confided to it by the Constitution; while, on the other hand, the right of the States, in the free and absolute exercise of the great mass of reserved powers, should be left unmolested by the general

government. If this rule is carefully observed collisions will be avoided and the government perpetuated, while its violation tends to confusion, conflict and destruction.

It is not material to the determination of this question whether the practice of delivering up criminals is a duty imposed by the laws of nations, or exists only by comity. Writers upon public law differ, and the adjudications are somewhat conflicting; but the weight of modern authority is that it is not a duty which may be demanded, but a favor which may or may not be granted without furnishing cause for complaint; and that our own government so regard it, we have the authority of Jefferson, Monroe and Clay, when respectively holding the office of secretary of state. (American State Papers.)

This subject was so fully and elaborately considered by the Supreme Court of the United States in *Holmes* v. *Jamison* (14 Peters, 540) that an extended discussion is unnecessary, if not inappropriate.

First, I think we should regard that case as an authoritative decision against the constitutionality of the act in question. Although the appeal was dismissed, yet the opinion of Chief Justice TANEY upon the merits in favor of the discharge of the prisoner was concurred in by three of his associates, STORY, MCLEAN and WAYNE, and, as to the merits, substantially by two others; although the latter agreed to a dismissal of the appeal upon other grounds.

The decision was regarded as binding upon the return of the case by the Supreme Court of Vermont, and the prisoner was discharged. (12 Vt., 631.) I am not aware of any adjudication since that time impairing the effect of this decision; and as the subject is one within the cognizance of the federal courts, the question should be regarded as settled. This is a much stronger case for holding the act of the governor invalid than the Vermont case. There the State had not acted at all. The act of the governor in issuing his warrant was not authorized by law, nor did it appear that any demand had been made by the Canadian government for the rendition of

the prisoner; and one of the judges agreed to a dismissal of the appeal upon the latter ground. Here the State has made a permanent regulation for the delivery of fugitives, and the record shows that a formal demand was made upon the governor according to the terms of the statute. If the same facts had appeared in that case, a judgment discharging the prisoner would have been rendered.

In the next place, the elaborate and exhaustive opinion of Chief Justice TANEY commends itself to our judgment as a correct exposition of the law on the subject, and it would be difficult to add anything to the force of his reasoning. It is admitted by the attorney-general that the general government possesses the power over the subject of extradition of fugitives from justice, and that if it had exercised the power in regard to Belgium it would be exclusive, and that no one could be delivered except through the federal machinery; but he insists that this power is dormant as to all countries with which the government have made no treaty; that the States are not prohibited from exercising it, and that such exercise is not repugnant or inconsistent with the power conferred on the government. This position is not tenable. It is true that a grant of power to the general government does not necessarily operate as a prohibition of the same power by the States. (*Sturges* v. *Crowninshield*, 4 Wheat., 122.) There are subjects over which the general government and the States may exercise concurrent authority. If the terms of the grant are not exclusive, and there is no express prohibition upon the States, and no repugnancy or inconsistency in its exercise by the States, the authority is concurrent.

This subject is not one of that character. The whole subject of foreign intercourse is committed to the federal government. Indeed, this was one of the principal purposes of the Union. As to foreign countries, the States, as such, are unknown. The treaty-making power is exclusive in the general government not only, but the States are prohibited from exercising it in express terms. So the appointment of ambassadors and receiving ambassadors from foreign coun-

tries are confided to the Union, and the States are prohibited from making any compact or agreement with any foreign power. The act of the legislature under consideration authorizes foreign ministers and officers of foreign governments to make a demand upon the governor, and empowers him to treat with these ministers, and accede, in his discretion, to their demand. It is patent that the exercise of such a power by the States may frustrate the foreign policy of the government both as to countries with which the government has made a definite treaty, and as to those with which it has not.

It has been the policy of the government in later years to enter into extradition treaties with foreign nations; but the propriety of doing so in any particular case may depend upon a variety of circumstances known only to the officers of the government. We cannot determine nor judicially know but that the government, for reasons of public policy connected with its negotiations, may have declined to enter into such a treaty with Belgium, the demanding country, or that country may have itself refused to make such a treaty without some undue stipulations on our part. Is it to be tolerated that a State may overrule the decision of the government, and thus embarrass its foreign negotiations, and, for that purpose, may the States receive and treat with foreign ministers?

If one State may, all the States may make these arrangements, which arrangements may all differ from each other; and the same States may make different arrangements with each foreign nation. The embarrassment which such an exercise of power by the States would produce to the general government in its foreign policy is obvious. The general government might adopt the policy of refusing to make an extradition treaty with all nations, or it might refuse as to Belgium or any other particular country. It cannot be said, from the absence of a treaty with any country or all countries, that the power is dormant. It may be as much exercised by refusing as by making a treaty. In the absence of a treaty we are to presume a refusal or failure to make one on the part of the government. In either case the power is not dormant.

The nature of the power is such that it cannot be dormant. It is necessarily in active exercise by the government when acting or omitting to act. The dormant powers are such as the States may exercise over their internal affairs without colliding with the action or non-action of the general government. Such is the subject of bankruptcy. If the general government omits, as it may, to pass uniform laws relating to bankruptcies, it is competent for the States to enact laws on that subject. An omission by the government to act can be regarded in no sense as a decision that such laws should not be enacted by the States, and the action of the States contravenes no policy of the government. So of taxation, except where there is a prohibition on the States. So when the general government leaves the regulation of commerce, the States may take it up within their respective jurisdictions; and there are other powers which are concurrent until a collision occurs, and then the government is supreme. (11 Pet., 102; 5 Wheat., 1; 12 id., 213.) But the dormant powers, as they are called, are those which may be exercised for the protection of the States within their territories, and relate to their internal affairs. As to foreign intercourse, and all questions relating thereto, the government alone can speak and act, and the power is therefore necessarily exclusive.

The difficulty in executing the power by the governor, and of determining the proper occasion of delivering up fugitives, serves also to illustrate the impropriety of State action and the repugnance of the power. The governor is authorized to deliver the fugitive "in his discretion." This is a delicate duty, and one which may lead to complications and ill-feeling with the country making the demand, and thus involve the general government in difficulty and possibly in war, which was one of the evils intended to be guarded against by giving to the Union the exclusive power over foreign affairs. The governor has power by the act to deliver up fugitives for all crimes punishable in this State by death, or States prison, except treason. This involves the power to determine when a case comes without the exception. There may be cases

where the real crime is treason, but the charge of other crimes is preferred and perhaps established for the purpose of securing a surrender of the accused. When beyond our territory the State is powerless to retake him, or obtain redress for the fraud and imposition, while the general government possesses ample power of redress. Again, it being conceded that extradition is included within the treaty-making power, if the States may regulate it, why may they not regulate any other question included in that power? Although expressly prohibited from entering into a treaty, the regulation of the proper subjects of it, is a practical exercise of the power, which renders the prohibition nugatory. In any view of the question the repugnance is clear. I think also that the express prohibition against making an agreement with a foreign power is violated by the act of the legislature.

The object of this provision was to prevent all official intercourse with foreign nations. By this act the foreign minister demands of the governor the surrender. The governor consents to deliver and does it. Is this not an agreement within the mischief which the Constitution was designed to prevent? If the State may make an agreement to deliver one fugitive upon a specific demand, why may it not make a general arrangement with a foreign power for all fugitives, and if it may bargain to deliver, why not for the surrender of its fugitives? Under this act, upon a demand, why may not the governor consent to surrender the fugitive upon condition that the foreign power will surrender a fugitive from this State?

The learned attorney-general says: "If I take a penny to give a beggar and subsequently change my mind, and put it back in my pocket, have I violated my contract? and from this he argues that there is no agreement under this act, because the governor may at any time before the actual surrender "at his discretion" refuse to surrender.

It does not establish that no agreement has been made to prove that there was a time when either one or both of the parties might have repented and recanted. It is unnecessary to determine that the governor might not, even after the sur-

render and before the fugitive leaves the State, revoke the warrant and discharge the prisoner. Under this act it is at least doubtful whether he could, and whether the power of the governor over the subject would not cease the moment the surrender was consummated by a delivery of the fugitive into the custody of the foreign power. But the character of the transaction is not changed if he could, and when the fugitive left the State the arrangement would certainly be completely executed, beyond the reach of recall, and it is not changed by the want of opportunity to violate it.

A promise to give a beggar a penny upon demand is an agreement in a general and moral, although not in a legal sense, because it cannot be enforced for want of consideration; and agreements of this character, by the States with foreign powers, imply intercourse and arrangement, which were designed to be prohibited as much as strictly legal contracts. Indeed, no contract can be enforced in courts of justice against a State. Moral duty is the only obligation which a State can incur, and if the term agreement in the Constitution does not mean such an obligation, it means nothing.

We should not, upon this question, apply the technical rules applicable to civil contracts which may be violated and enforced. We must give such a construction to the term agreement as will effectuate the objects intended to be promoted, and avoid the evils designed to be prevented. These agreements need not be in writing nor founded upon any legal consideration. Any arrangements in relation to public questions are included in the term, and are intended to be prohibited. I am of the opinion that the act of the legislature is within the evils intended to be prevented, and is a violation of the express prohibition of the Constitution of the United States against making agreements with foreign powers. It is also claimed by the attorney-general that this act may be upheld under the acknowledged police power of the State, to prevent the entrance into the State of dangerous persons, and to remove them when admitted. (*City of New York* v. *Miln*, 11 Peters, 102.)

Whatever police power the State may possess of the character alluded to for its own protection, it is a sufficient answer to this position that the State has exercised no such power. The surrender of fugitives provided for is upon the demand and for the benefit of foreign powers, and not for the safety of the State. The police power requires neither co-operation or intercourse with foreign nations, and has no bearing upon this question. Vogt is to be surrendered under the act upon the demand only of the authorized minister of the foreign power, and not because he is unworthy of our hospitality. The governor in issuing the warrant acted under the authority of the statute, and had no power to act otherwise. He did not and could not exercise the police power invoked in this case without law, and, as we have seen, the legislature has not exercised it, and it is therefore unnecessary to discuss what power the legislature possesses in that direction.

It is urged that Vogt is a great criminal, and ought to be punished. If he has been guilty of the offences laid to his charge, of murder, robbery and arson, justice to him and protection to the community, demand his conviction and punishment. But however much we may regret the result on this account, we are more than compensated by the reflection that the escape of a single felon from the punishment due to his crimes is an insignificant evil compared with the consequences which may flow from sanctioning a violation of the Constitution of the United States.

The judgment must be affirmed.

All concur, PECKHAM, J., concurring in result.

Judgment affirmed.

Statement of case.

Duncan McColl et al., Appellants, v. The Sun Mutual Insurance Company, Respondent.

The right of a party to an action to have the evidence of witnesses taken upon commission, and the power of the court to award a commission, depends solely upon the statute.

Under the statute (2 R. S., 394, §§ 11, 12, 23), a commission is not authorized unless an issue of fact is joined, and is depending when the application therefor is made, and the right to the trial of the issue appears upon the record.

Accordingly *held*, that an order awarding a commission made after the judgment and appeal, and while the appeal was pending undetermined, was erroneous (Grover, J., dissenting).

(Argued November 12, 1872; decided November 19, 1872.)

Appeal from order of the General Term of the Superior Court of the city of New York, reversing an order of Special Term awarding commissions to take the testimony of certain witnesses residing in Nova Scotia. The order was made after trial and judgment and appeal, and while the appeal was pending undetermined.

Albert Matthews for the appellants. The statute under which the commission issued is remedial, and should be liberally construed. (*People* v. *Tibbets*, 4 Cowen, 392; *Donaldson* v. *Wood*, 22 Wend., 397; *Weed* v. *Tucker*, 19 N. Y., 433; *Wegman* v. *Childs*, 41 id., 159.) The order for the commission was in the discretion of the court, and is not appealable. (*Thatcher* v. *Bennett*, N. Y. Sup. Ct., February, 1854, cited in Voorhies' Code of 1870, p. 555, note to section 349; *St. John* v. *West*, 4 How. Pr., 331; *Fitch* v. *Livingston*, 4 Sand., 713; *Leighton* v. *Wood*, 17 Abb. Pr., 177; *Butler* v. *Niles*, 3 Rob. S. C. R., 645; *Bk. of Commonwealth* v. *Temple*, 39 How. Pr., 439; *Seely* v. *Chittenden*, 10 Barb., 303; *Buffalo S. Bk.* v. *Newton*, 23 N. Y., 160; *White* v. *Munroe*, 33 Barb., 650; *N. Y. Ice Co.* v. *N. W. Ins. Co.*, 23 N. Y., 362; *Baldwin* v. *The Mayor of N. Y.*, 2 Keyes,

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387; *Moncrief* v. *Moncrief*, 10 Abb. Pr., 315; *Sayre* v. *Frazer*, 47 Barb., 26; *Wood* v. *The Mayor*, 4 Abb. Pr. [N. S.], 152; see also Voorhis' Annotated Code of 1870, p. 534, note *d*; *Vandervoort* v. *Columbian Ins. Co.*, 2 Johns. Cas., 137; *Ring* v. *Mott*, 2 Sand. S. C. R., 683; *Rucco* v. *Pearce*, 3 Jurist, 978; *Ranney* v. *Weed*, 1 Barb., 221; *Mitchell* v. *Montgomery*, 4 Sand., 676; *Nicol v. Col. Ins. Co.*, 1 Caines, 345; *Fisher* v. *Dale*, 17 J. R., 343; *Parker* v. *Nixon*, 1 Bald. U. S. C. C. R., 291; *Winthrop* v. *U. S. Ins. Co.*, 2 Wash. U. S. C. C. R., 712.) Our courts often issue commissions without naming witnesses, for the sake of convenience. (*The Infanta*, 1 Abb. Adm'r R., 266; *Heaton* v. *Findley*, 12 Penn. [2 Johns.], 304, 310; *Carbonell* v. *Bessell*, 5 Simmons, 636; *Bersford* v. *Easthrope*, 4 Jurist., 104; *Rougemont* v. *Royal Ex. Ins. Co.*, 7 Vesey, Jr., 304; *Gow* v. *Kinnersley*, 6 Mann & Gr., 981; *Same Case*, 8 Jurist, 364; *Dimond* v. *Vallance*, 7 Dowl. Pr. Cas., 590; S. C., Anon., 3 Jurist, 385.) Plaintiffs being in all respects regular, had a right to the order. (*Demar* v. *Van Zandt*, 2 Johns. Cas., 69; *Murray* v. *Kirkpatrick*, 1 Cowen, 210; *Beall* v. *Day*, 7 Wend., 513; *Deshaye* v. *Persse*, 9 Abb. Pr., 289, *n.*; 2 R. S., 393, § 11, act of 1862, chap. 375; *Sparks* v. *Barrett*, 5 Scott's R., 406; *Franklin* v. *United Ins. Co.*, 2 J. Cas., 68, 285; *Shaffer* v. *Wilcox*, 2 Hall, 502; *McMahon* v. *Allen*, 18 Abb., 298; *Wright* v. *Jessup*, 3 Duer, 642; *Brown* v. *Southworth*, 9 Paige, 358; 2 Dan. Ch. R. [1 Am. ed.], 1099 to 1102; *Forrest* v. *Forrest*, 25 N. Y., 506; *Bowen* v. *The Irish Presb. Corp. of N. Y.*, 6 Duer., 264.)

Samuel Hand for the respondent. The order awarding the commission was erroneous. (2 R. S. [Edms. ed.], 409–412, Laws of 1862, chap. 375.) A party should not be allowed to examine upon commission a witness who has been examined orally *de bene esse* by counsel of both parties. (*Raney* v. *Weed*, 1 Barb., 220.) A commission to examine witnesses not named or described is never allowed. (*Shaffer* v. *Wilcox*, 2 Hall., 502; *Wright* v. *Jessup*, 3 Duer, 642.)

Opinion of the Court, per Andrews, J.

Andrews, J. The order awarding a commission in this case was made at Special Term, upon the application of the plaintiffs, after judgment and after appeal therefrom by the defendant to the General Term, and while the appeal was pending and undetermined.

The right of a party to an action to have the evidence of witnesses taken upon commission, and the power of the court to award a commission, depends solely upon the statute.

The statute authorizes the court to award a commission for the examination of foreign witnesses whenever an issue of fact shall have been joined and it shall appear that the witness to be examined is "material in the prosecution or defence" of the action. (2 Rev. Stat., 394, § 11.) In settling the interrogatories to be attached to the commission, each party may insert any question "pertinent to the cause." (Section 12.) And the examination and depositions taken may be "used on the trial of the cause." (Section 23.)

We are of opinion that under this statute where an issue of fact has been joined a commission is not authorized to be issued, unless the issue of fact is depending when the application is made and the right to a trial of the issue appears upon the record.

This is not the condition of a case pending on appeal after trial upon the merits and after judgment. The issue of fact is then determined and is merged in the judgment.

The reversal of the judgment may require a new trial of the action, but this event is uncertain.

There is no present right to a trial and there may never be such right, and the presumption is in favor of the validity of the judgment.

It cannot be made to appear, upon the application in such case, that the witness, whose examination is sought, "is material in the prosecution or defence of the action." Its further prosecution, by trial, depends upon the judgment of the appellate court.

If the right to award a commission exists, pending an

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appeal from the judgment, then it may be awarded, although the appeal is pending in this court.

Such a power is not within the contemplation of the statute; and the power of the court to award a commission, can only be exercised before trial and judgment. It may be that it would be in furtherance of justice to extend the statute so as to embrace causes like this, but it is to be considered that it would subject the prevailing party in the judgment to the trouble and expense of joining in the commission with a view to a new trial, although judgment had passed in his favor.

The order appealed from should be affirmed with costs.

All concur, except GROVER, J., dissenting.

Order affirmed.

SAMUEL D. HOVEY et. al., Respondents, *v.* THE RUBBER-TIP PENCIL COMPANY, Appellant.

Counsel fees for the trial of an action in which a temporary injunction has been issued cannot be recovered as damages upon the undertaking given upon the granting of the injunction unless it appear that such expenses were incurred by reason of the injunction.

A party is entitled to damages for all expenses which he has incurred for fees and for legal expenses in removing the temporary injunction, and also any damages to his business or otherwise necessarily resulting from it.

(*Andrews* v. *The Glenville Woolen Company*, *ante*, p. 282, distinguished.)

(Argued November 12, 1872; decided November 19, 1872.)

APPEAL from order of the General Term of the Superior Court of the city of New York, affirming an order of Special Term, setting aside the report of a referee awarding damages upon an undertaking given upon the granting of a temporary injunction herein. The referee awarded as damages $500 counsel fees paid by defendant upon the trial of the action.

John S. Washburne for the appellant. Defendant was entitled to reasonable counsel fees. (*Edwards* v. *Bodine*, 11 Paige, 224; *Aldrich* v. *Reynolds*, 1 Barb. Ch., 613;

Wilde v. *Joel et al.*, 15 How. Pr., 329; *Corcoran* v. *Judson*, 24 N. Y., 106.) Any method or procedure deciding that plaintiffs were not entitled to the injunction is within the language of the Code and undertaking. (*Meth. Church* v. *Barker*, 18 N. Y., 465; *Childs* v. *Lyon*, 3 Rob., 704; *Loomis* v. *Brown*, 16 Barb., 325; *Disbro* v. *Disbro*, 37 How. Pr., 148; 1 Till. & Shear. Pr., 728; 2 Story's Eq. Jur. [Redfield's ed.], § 799.) Defendant need not resort to a regular action upon the undertaking. (*Willett* v. *Scovil*, 4 Abb., 405; *Meth. Church* v. *Barker*, 18 N. Y., 465; *Dickerson* v. *Cook*, 3 Duer, 324.)

Ambrose Monell for the respondents. Defendant's expenses were not occasioned by reason of the injunction, but in defending a suit, plaintiffs had a right to bring, and should not be allowed. (*Town of Guilford* v. *Cornell*, 4 Abb. Pr., 220; *Strong* v. *De Forest*, 15 id., 427; *Coates* v. *Coates*, 1 Duer, 664; *Wilde* v. *Joel*, 15 How. Pr., 220; *Edwards* v. *Bodine*, 11 Paige, 223; *Andrews, Rec'r, etc.*, v. *Glenville Woolen Co.*, Gen. Term; *Childs* v. *Lyon*, 3 Robt., 704.)

CHURCH, Ch. J. No motion was made to dissolve the injunction, nor does it appear that any expenses were incurred in consequence of it. The expenses proved were the expenses and counsel fees in the management and preparation of the case for trial, and the trial of the same, and no evidence was produced to show that any part of the sum was expended by reason of the temporary injunction, nor but that the same amount would have been incurred if no temporary injunction had been issued.

The principles laid down at the General and Special Term accord with the recent decision of this court in *Andrews* v. *The Glenville Woolen Company* (*ante*, p. 282), that, in order to recover as damages counsel fees, or any part of them, for the trial of an action in which a temporary injunction was issued, it must appear in some way that such expenses were incurred by reason of such injunction. In that case a motion had been

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made to dissolve the injunction, which was denied, upon the ground that as the motion involved the whole merits of the action, which was brought to secure a permanent injunction, it was more appropriate that it should be determined upon a trial. The defendant was therefore compelled to go to trial to secure a decision that the party was not entitled to the injunction in order to recover the damages which he had sustained in endeavoring to procure a dissolution, and this court held that a counsel fee for the trial of the action was proper. The facts proved in this case do not bring it within the principle decided in that case. A party is entitled to damages, not only for all expenses which he has incurred for fees and for legal services in removing the temporary injunction, but also any damages to his business, or otherwise necessarily resulting from it.

As none was proved in this case the order must be affirmed.

All concur.

Order affirmed.

RUSSELL D. MINER, Appellant, *v.* ANNIE M. BEEKMAN et al., Respondents.

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Section 78 of the Code, which limits the time for the commencement of actions for the recovery of the possession of real property to twenty years, includes only those actions which, prior to the Code, were actions at law for the recovery of real property or its possession.

Where one claiming to be the owner in fee of lands subject to the lien of a mortgage, of which lands the mortgagee is in possession, institutes an action seeking for an accounting, for liberty to pay the amount ascertained to be due upon the mortgage, and upon payment to be let into possession; such action is not embraced within section 78, but comes within the provisions of section 97, which limits the time for the commencement of actions for relief, not before provided for in the preceding sections, to ten years.

Such a cause of action, however, does not accrue when the money secured by the mortgage becomes due, but only when the mortgagee enters into possession; and *it seems* not then, if the mortgagee enters and continues in possession avowedly as mortgagee, not claiming the fee. While

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the owner of the fee of lands continues liable to an action for the foreclosure of a mortgage or for the payment of any encumbrance thereon which is past due, he has a continuing right to invoke the aid of equity to determine the amount of the lien, if uncertain, and to compel its discharge upon payment; and an action to enforce this right cannot be barred by the statute of limitations.

But where a purchaser upon a foreclosure sale enters into possession, claiming title under such sale, the right to an action for this equitable relief, of a grantee from the mortgagor, as to whom the foreclosure is a nullity, for the reason that he was not made a party thereto, is barred after the possession of the purchaser or his grantee has continued for ten years.

Where an owner has permitted his right to satisfy a mortgage to remain dormant for nearly thirty years, during which time others have paid the assessments and taxes and made improvements, in the belief that they had title under a foreclosure of the mortgage, equity will require, as a condition of his regaining possession, the payment of such assessments and taxes and for such improvements, in addition to the amount of the mortgage.

(Argued November 13, 1872; decided November 19, 1872.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of defendants entered upon an order of the court upon trial at Special Term dismissing plaintiff's complaint. (Reported below, 42 How. Pr., 33.)

The action was brought by plaintiff, claiming to be the owner of the fee of certain premises in New York city, against defendants, as grantees of a mortgagee in possession, asking to have the amount of the mortgage determined, and upon payment that the same be discharged of record, and plaintiff be let into possession.

On the 3d of November, 1838, Isaac M. Woolley, being owner in fee of four lots of land on Fourth avenue, in the city of New York, with his wife executed to Leonard W. Lawrence a mortgage thereon for $1,000, payable November 3d, 1839. On the 16th of May, 1842, Woolley conveyed the same land, subject to the mortgage, to the plaintiff. On the 5th of November, 1842, a suit was commenced to foreclose the mortgage, in which notice of *lis pendens* was filed, and the suit resulted in a decree of foreclosure and sale of the

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mortgaged premises, which were sold under the decree, January 19, 1843, and on the 16th of March, 1843, the master executed a deed to the purchaser, Lawrence, the mortgagee. The plaintiff was not a party to the suit. On the 12th of March, 1867, Lawrence and wife conveyed a part of the premises to Isaac R. Kendall, and on April 1st, 1869, Kendall conveyed a part of the same premises to the defendant, Annie Beekman, and a part to the defendant, Hugh Crombie, under which they both took and hold possession. Woolley paid interest on the mortgage to Lawrence up to May 1st, 1841.

When the plaintiff rested the defendants' counsel moved to dismiss the complaint on the ground that the action was barred by the statute of limitations, which motion was granted.

J. M. Hawes for the appellant. The alleged foreclosure, as to plaintiff, is a nullity. (*Kortright* v. *Cady*, 21 N. Y., 343; *Peabody* v. *Roberts*, 47 Barb., 91; *Gage* v. *Brewster*, 31 N. Y., 218, 223; *National Fire Ins. Co.* v. *McKay*, 5 Abb. [N. S.], 445, 450, 451; 3 J. C. R., 465; 4 Kent, 184; 2 Seld., 562, 565; *Brainard* v. *Cooper*, 10 N. Y., 356, 359, 360; *Packer* v. *Rochester and S. R. R. Co.*, 17 N. Y., 283–289; *Kemble* v. *Wallis*, 10 Wend., 347; *Bruce* v. *Tilson*, 25 N. Y., 194–202; *Phyfe* v. *Riley*, 15 Wend., 248; *Chase* v. *Peck*, 21 N. Y., 581, 586.) The ten years' statute of limitations does not apply to this case. (4 Kent, 11th ed., 213–215, note 1; *Nat. Fire Ins. Co.* v. *McKay*, 5 Abb. [N. S.], 445–450; 1 R. S., title 2, ch. 4, part 3; *People* v. *Molyneux*, 40 N. Y., 113; *Marion* v. *Lewis*, 61 Barb., 49; *Borst* v. *Corey*, 15 N. Y., 505; Story's Eq. Jur., § 1028; *Moore* v. *Cable*, 1 J. Ch. R., 385; *Demarest* v. *Wynkoop*, 3 id., 129, 135, 136; *Robinson* v. *Fife*, 3 Ohio St. R., 551, 560; R. S. Wis., 1858, 821, § 22; *Knowlton* v. *Walker*, 13 Wis., 264; *Waldo* v. *Rice*, 14 id., 286; Code, § 90.) The court may grant any relief consistent with the case made by the complaint and embraced within the issue. (Code, §§ 69, 275; *Emery* v. *Pease*, 20 N. Y., 62; *Barlow* v. *Scott*, 24 id.,

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40; *Corn Exch. Ins. Co.* v. *Babcock*, 42 id., 646; *Phillips* v. *Gorham*, 17 id., 273; *Greason* v. *Keteltas*, 17 id., 491; *Marquat* v. *Marquat*, 12 id., 336; *Conaughty* v. *Nichols*, 42 id., 83; *Davis* v. *Morris*, 36 N. Y., 569; *Lattin* v. *McCarty*, 41 id., 109; *Lamb* v. *Buckmiller*, 17 id., 626; *Bidwell* v. *Astor Mut. Ins. Co.*, 16 id., 263; *N. Y. Ice Co.* v. *N. Y. Ins. Co.*, 23 id., 357; *Dobson* v. *Pearce*, 12 id., 165; *Crary* v. *Goodman*, 12 id., 266; *N. Y. and N. H. R. R. Co.* v. *Schuyler*, 17 id., 604; *Bartlett* v. *Judd*, 21 id., 205; *Penn. Coal Co.* v. *Del. and Hud. Canal Co.*, 1 Keyes, 72; *Trurcott* v. *King*, 6 N. Y., 165; *Roy* v. *Platt*, 4 Paige, 77.)

A. R. Dyett for the respondents. Defendants are mortgagees in possession. (25 N. Y., 320; 47 id., 261.) The right to commence this action accrued November 4, 1839. (2 R. S., 301, § 52; id., 192, § 158; Code, § 97; *Elwood* v. *Deifendorf*, 5 Barb., 399; *Calkins* v. *Calkins*, 3 id., 305; 20 N. Y., 147; *Spoor* v. *Wells*, 3 Barb. Ch. R., 199; *Davis* v. *Duffie*, 8 Bosw., 617; *Peabody* v. *Roberts*, 47 Barb., 91; *Bruce* v. *Tilson*, 25 N. Y., 194; *Sykes* v. *Roberts*, 30 Barb., 473; *Kortright* v. *Cady*, 21 N. Y., 365; *Wells* v. *Pierce*, 3 Keyes, 102; *Cleaveland* v. *Boerum*, 24 N. Y., 613.) A tender is not necessary to maintain a bill in equity to redeem. The tender affects only the question of costs. (25 N. Y., 194; 28 id., 535.) Plaintiff could not have maintained an ejectment against the defendants, mortgagees in possession. (*Chase* v. *Peck*, 21 N. Y., 581, 586, DENIO, J.; *Phipps* v. *Reilly*, 15 Wend., 248.) The right of the mortgagor is only "an equity of redemption." (2 R. S., Edm. ed., 382, § 31; *Charter* v. *Stevens*, 3 Den., 33; *Hill* v. *Beebe*, 13 N. Y. [3 Kern.],* 565; *Olcott* v. *Tioga R. R. Co.*, 27 id. [13 Smith], 547, 566; *Chase* v. *Peck*, 21 id., 586; *Watson* v. *Spence*, 20 Wend., 263; *Tibbs* v. *Morris*, 44 Barb., 146; *Walsh* v. *The Rutgers Fire Ins. Co.*, 13 Abb., 39; *Hartley* v. *Harrisson*, 24 N. Y., 172, 174, etc.; *Shields* v. *Lozear*, 34 N. J. [5 Vroom.], 496; *Winslow* v. *Clark*, 2 Sickels, 261.) The mortgagor could not

bring an action at law against the mortgagee in possession. (*Fuller* v. *Acker*, 1 Hill, 475; *Burdick* v. *McVanner*, 2 Den., 170.) The equity of redemption is barred by statute at the expiration of ten years. (4 Kent's Com., 213; 2 R. S., 2d ed., 229, § 52; *Peabody* v. *Roberts*, 47 Barb., 91; *Randall* v. *Rabb*, 2 Abb. Pr. R., 307; *Oakes et al.* v. *Howell*, 27 How. Pr. R., 145; *Calkins* v. *Isabel*, 20 N. Y., 147; *Bennett* v. *Cook*, 45 id., 268; *Wells* v. *Pierce*, 8 Keyes, 102; *Van Allen* v. *Feltz*, 1 id., 332; *Appleby* v. *Brown*, 24 N. Y., 144; *Roberts* v. *Sikes*, 30 Barb., 173; *Van Nest* v. *Lott*, 16 Abb., 130.)

GROVER, J. The counsel for the appellant insists that the action may be regarded as one for the recovery of real estate, and that therefore the time limited for its commencement, after it accrued by statute, is twenty years. (Code, § 78.) But this, within the meaning of the statue, is not an action for the recovery of real property. That was intended to include such cases only as prior to the enactment of the Code were actions at law for the recovery of real property or its possession, which were triable by jury. This is manifest from all the provisions of the Code fixing the time within which actions for all purposes must be commenced. All the allegations of the complaint in this case show that the plaintiff, claiming to be the owner of the fee of the lots in question, subject to the lien of a mortgage thereon given by his grantor, of which the defendants were in possession as mortgagees, under such mortgage, instituted the action for an accounting between the parties, and for liberty to pay the amount ascertained to be due, and, upon such payment being made, to be let into possession. This, instead of an action to recover real property or its possession within the meaning of the Code, was an equitable action to have the amount due upon the mortgage ascertained, and the sum that upon equitable principles he was bound to pay to exonerate the lands from the lien fixed upon payment, a discharge of the lands from the encumbrance and the possession given to him of such a

suit prior to the Code, no court of law had jurisdiction. It was exclusively of equity cognizance. The case is not altered by the fact that a recovery of the possession is prayed for as a part of the relief sought, and which may be had in the action. The latter relief was always given in equity in like cases prior to the Code. An examination of the various provisions of the Code, limiting the time for the commencement of actions, shows that the relief sought in this action is not specially provided for in any of them. Hence it comes within § 97, which provides, that an action for relief, not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued. The majority of the court below rightly held that ten years was the limit fixed for the commencement of the action after the cause accrued. The question is, when did it accrue? Was it the time when the money secured by the mortgage became due, or the time when the defendants or their grantors entered into posession? If the former, the judgment is right, as the money became due much more than ten years prior to the commencement of the action. If the latter, the judgment dismissing the complaint was erroneous, as there was no proof tending to show that the defendants or their grantor entered into possession ten years before the commencement of the action. The argument upon the part of the defendants, is that the mortgagor, upon the money becoming due, has a right to come into a court of equity to have the amount of the lien determined, and discharged of record upon payment. So far, his position is correct. The right to such an action then accrues. But is the deduction therefrom equally sound; that is, that this right is barred by the statute after the lapse of ten years? If so, the mortgagor after this is placed in a somewhat embarrassing condition. I am now speaking of a case where the mortgagor has continued in possession. He remains liable to an action for the foreclosure of the mortgage after the lapse of ten years, his title remains encumbered upon the record, and he has no power to get it discharged. It may be said that he can discharge the lien by a tender of the amount due upon

the mortgage. (*Kortright* v. *Cady*, 21 N. Y., 343, and cases cited.) But although this will discharge the land, it will not relieve it from the apparent encumbrance upon the record, which may be a matter of considerable importance to the mortgagor. Besides, the amount due may be uncertain, and the aid of equity may be necessary to determine it, and the evidence of the tender may be lost. It is an acknowledged branch of equity jurisdiction to remove clouds from the title at the suit of the owner of the fee. Such owner has a right to invoke this aid. But must he do it within ten years after the commencement of the cloud, or may he do it at any time during its existence while he continues such owner? My conclusion is, that this is a continuing right that may be asserted at any time during the existence of the cloud; never barred by the statute of limitations while the cloud continues to exist. This results from the continuing character of the right, which is equally as potent after the lapse of eleven years as it was during the first ten. It is a right inherent in the owner of the fee to have clouds removed, and apparent but not real encumbrances discharged of record at all times. While the owner of the fee continues liable to an action for the foreclosure of a mortgage or for the payment of any encumbrance upon his land which is past due, he has a continuing right to the aid of equity to determine the amount, if uncertain, and to compel its discharge upon payment, and an action to enforce this continuing right cannot be barred by the statute of limitations, for the reason that it is continuing. This is analogous to the rule as to private nuisances, which are regarded as continuing injuries; and although damages sustained therefrom cannot be recovered for more than six years prior to the commencement of the action, yet a recovery may be had for this period, although the nuisance had its origin before such time. This conclusion is sustained by the learned editor of the 11th edition of Kent's Com., note, vol. 4, 213. But the present is a much stronger case against the bar of the statute. Here the plaintiff, who has acquired the title of the mortgagor, is out of possession. The defendants, if they have acquired the rights of the

mortgagee, can defend their possession by virtue of the mortgage. (*Phyfe* v. *Riley*, 15 Wend., 248; *Chase* v. *Peck*, 21 N. Y., 581.)

The aid of equity has in that case become necessary for the plaintiff to remove this mortgage before he can recover possession. But when did such aid become essential to him? Clearly not until the defendants or their grantor entered into possession. Then, and not until then, did the plaintiff require this remedy to regain the possession. This cause of action for this purpose did not accrue until such possession was taken. This has been so held by the Supreme Court of Wisconsin, under a statute almost precisely similar to that of this State. (*Knowlton* v. *Walker*, 13 Wis., 264; *Waldo* v. *Rice*, 14 id., 286.) The statute, I think, would not then commence running had the defendants or their grantor entered and continued in possession, avowedly as mortgagees, and would not run while they so held, for the reason that it is a continuing right of the owner to pay off and discharge a mortgage, and, by so doing, regain the possession of the land. But so far as appears in this case, neither the defendants nor their grantor so entered and held the possession, but, on the contrary, claimed the entire fee, under deeds in fee, commencing with the deeds of a master in chancery, given upon a sale made in an action for the foreclosure of the mortgage in question to the purchaser. The plaintiff not having been made a party to this action, it is a nullity as to him. (*Gage* v. *Brewster*, 31 N. Y., 218.) Under these facts, if the possession of the defendants or their grantor has continued for ten years, the action is barred by the statute, otherwise not. It is suggested, by the counsel for the plaintiff, that as more than twenty years had elapsed from the time the money became due upon the mortgage before the commencement of the action, the presumption of payment created by the statute has attached. It is a complete answer to this, that the complaint contains no allegation of payment. Besides, it sets forth the foreclosure, sale and claim of title under these proceedings. It is also insisted by the counsel that the defendants have not

acquired the mortgage, and cannot therefore be regarded as mortgagees in possession. But the purchaser at a mortgage sale, ineffectual to pass the title, acquires thereby title to the mortgage. (*Robinson* v. *Ryan*, 25 N. Y., 320; *Winslow* v. *Clark*, 47 id., 261.)

When, as in this case, a plaintiff has permitted his right to satisfy a mortgage to remain dormant for nearly thirty years, during which others have paid the assessments and taxes, and made improvements in the belief that they had title under a foreclosure of the mortgage, he cannot complain that, as a condition of regaining possession, he is compelled to account for and pay such taxes, assessments and for such improvements, according to the just and enlightened principles of courts of equity.

The judgment appealed from must be reversed, and new trial ordered, costs to abide event.

All concur.

Judgment reversed.

MARY C. REED et al., Respondents, *v.* THOMAS GANNON, impleaded, etc., Appellant.

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Notice to a purchaser of property of the existence of liens or encumbrances thereon is sufficient, in the absence of explanation, to charge him with notice of any and all liens or encumbrances which an inquiry would have disclosed. It is not necessary in such a case to show actual notice of the particular instrument creating a lien to deprive him of the character of a *bona fide* purchaser.

By articles of separation between a husband and wife, certain chattels were conveyed to a trustee for the benefit of the wife, and were accepted in full satisfaction for her support and maintenance, on condition that all mortgages, etc., thereon should be discharged by the husband in ninety days, which he covenanted to do. The instrument declared that the wife did not admit the validity, as against herself, of any outstanding mortgage, etc., and that the husband did not assume any liability beyond the amount of existing liens. At the time of the execution of the instrument a chattel mortgage existed upon the pro-

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perty, which was not filed, and was unknown to the wife or trustee. No inquiry was made by them as to encumbrances. *Held* (PECKHAM, J., dissenting), that the language of the instrument implied the existence of mortgages, and was sufficient to put them upon inquiry, and that they were chargeable with notice of the existence of the mortgage in question.

Also *held* (GROVER, J.), that the trustee was not a purchaser for value.

It seems that where chattels are purchased by the husband as presents for the wife, and are notoriously recognized as her property, it does not follow from the fact that they are brought into the house jointly occupied by them (they being so brought in as her property) that they are in his possession or legally under his control, and in the absence of fraud her title will be good, even as against subsequent creditors of or purchasers from her husband.

(Argued May 28, 1872; decided November 26, 1872.)

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, affirming a judgment in favor of plaintiffs, entered upon the decision of the court at Special Term.

This action was brought to restrain defendant Gannon from foreclosing a mortgage upon certain chattels, executed to him by defendant Reed.

The plaintiff, Mary C. Reed, was the wife of defendant, Osmon Reed, Jr. They separated, and on April 27th, 1867, a deed of separation was duly executed, to which they and plaintiff Nunez, as trustee for the wife, were parties, whereby Reed transferred to the trustee, in trust for the wife, the chattels mentioned in the complaint, he covenanting to pay off and discharge "any lien, mortgage or encumbrance, of whatsoever kind or description, existing on the same, within ninety days, the same being received by the wife and her trustee (parties of the second part) in full satisfaction for her support and maintenance, on condition that all liens, etc., be discharged as aforesaid.

The said deed also contained the following clauses:

"And it is further understood and agreed by the parties hereto, that the said Mary Catharine Reed does not hereby admit the validity, as against herself, of any outstanding

mortgage, lien or encumbrance thereon; and further, that nothing herein contained is to be construed as an admission on the part of the said Reed that he is liable for the maintenance or support of the said Mary Catharine Reed while living separate and apart from him, or that he hereby assumes any liability beyond the amount of existing liens on said furniture and effects. And the said trustee, in consideration of the premises, and of one dollar to him duly paid, does hereby covenant, promise and agree, to and with said party of the first part, to indemnify and save him harmless of, against and from all debts of his said wife contracted, or that may hereafter be contracted by her."

On the 16th February, 1867, Reed gave to defendant Gannon a chattel mortgage upon the property in question to secure the payment of a loan of $1,500. The mortgage was not filed at the time of the execution of the trust deed above mentioned, and neither the wife nor her trustee had knowledge of its existence.

In July, 1867, defendant Gannon attempted and threatened to take possession of the property under his chattel mortgage. Reed was then insolvent. It appeared upon the trial that a greater portion of the articles in question were given Mrs. Reed by her husband as wedding or birthday presents, and that they were recognized as her property.

The court held that the articles were not the separate property of the wife, but belonged to her husband at the time of the execution of the trust deed; but that plaintiff Nunez as trustee stood in the position of purchaser in good faith, and as against both plaintiffs the mortgage was void.

Amasa J. Parker for the appellant. Plaintiffs had notice of the mortgage in question when the articles of separation were executed and delivered. (*Galatin* v. *Erwin*, Hopkins' R., 48; Willard's Eq. Jur., 608, 286, and cases there cited; *Jewett* v. *Palmer*, 7 John. Ch., 65, 68; *Harrison* v. *Southcote*, 1 Atk., 538; *Story* v. *Lord Windon*, 2 id., 630; *Thomas* v. *Graham*, Walker Ch. R., 117; *Putnam* v. *Hubbell*, 42 N.

Y., 106; *Wast* v. *Flinn*, 43 id., 23; *Austin* v. *N. J. Co.*, id., 76; *Draper* v. *Stouvenal*, 38 id., 219; *Cox* v. *James*, 45 id., 557; 2 R. S., 5th ed., 222, § 5.) Whenever the purchaser has sufficient to put him on inquiry, he is in equity considered as having notice. (*Pitney* v. *Leonard*, 1 Paige, 461; *Hawley* v. *Cramer*, 4 Cow., 717; *Williamson* v. *Brown* 15 N. Y., 354; *Pendleton* v. *Fay*, 2 Pa., 205; *Howard Ins. Co.* v. *Halsey*, 8 N. Y., 275; *Brush* v. *Ware*, 15 Pet., 112; *Jenkins* v. *Eldredge*, 3 Story, 182.)

James Clark for the respondents. The transfer to the wife's trustee was based on a sufficient consideration, and is valid as against the creditors of the husband. (Hill on Trustees, 426; 3 Lead. Cas. in Eq., 404, *n*; *Worrall* v. *Jacob*, 3 Merrivale, 272; *Stevens* v. *Olive*, 2 Bro. Chan. Ca., 90; *King* v. *Brewer*, id., 93, *n*; *Compton* v. *Collison*, id., 377; *Fitzer* v. *Fitzer*, 2 Atk., 514; *Page* v. *Trufant*, 2 Mass., 161; *Simpson* v. *Simpson*, 4 Dana, 141; *Elworthy* v. *Bird*, 2 S. & St., 381.) The *onus* of proving notice to plaintiffs of the existence of the mortgage rests upon the defendants. (1 Greenl. Ev., § 74; 4 Kent's Com., 171, 172; *Curtis* v. *Lent*, 15 N. Y., 192; *Fort* v. *Burch*, 6 Barb., 60, 78; *Hine* v. *Dodd*, 2 Atk., 275; Pow. on Mort., 639, 640; *Jackson* v. *Elston*, 12 John., 452; *Jackson* v. *Given*, 8 id., 137, 140, 141.)

RAPALLO, J. The plaintiffs took from Osmond Reed a covenant, contained in the trust deed under which the plaintiffs claim, that Reed would, within ninety days after the date of the instrument, pay off any lien, mortgage or incumbrance, etc., existing on the chattels transferred, or any part thereof; and, by the same instrument, Mrs. Reed, and Nunez as her trustee, covenanted that said chattels should be received in full satisfaction for her support and alimony, on the condition, however, that all mortgages, etc., on said chattels should be promptly discharged, as therein above stipulated. The instrument then declares that Mrs. Reed does not admit the validity, as against herself, of any outstanding mortgage, etc., thereon;

and that Mr. Reed does not assume any liability beyond the amount of *existing liens* on said furniture and effects; and, in consideration of the premises, Nunez, the trustee, covenants to indemnify Reed agaist debts contracted by his wife.

This language plainly implied that there were mortgages or liens upon the property, and the payment of them by Reed was made a condition of the contract. Had the understanding of Nunez been that the property was unincumbered, and had the only object of the covenant been to protect Nunez or Mrs. Reed, in case they should afterward discover the fact to be otherwise, they would have taken a covenant that the property was free from incumbrances. The covenant to pay incumbrances existing on the property, within ninety days, and making the performance of that covenant a condition of the release of alimony, and the limitation of Reed's liability to the amount of existing liens, together with Mrs. Reed's protest against the validity, as to her, of any outstanding mortgages, etc., on the property, are inconsistent with the idea that the parties were dealing on the supposition that the property was free from incumbrance.

The insertion of these clauses in the instrument was sufficient to put the plaintiffs on inquiry as to the extent and description of the existing incumbrances referred to.

It was such notice as, in the language of the authorities, "would lead any honest man, using ordinary caution, to make further inquiries." (1 Younge & Coll. Exch., 328.) To deprive a party of the character of a *bona fide* purchaser, it is not necessary in such a case to show express notice of the particular instrument. (*Taylor* v. *Baker*, 5 Price, 306.) Notice of any fact calculated to put the party on inquiry is, in the absence of explanation by him, sufficient to charge him with notice of all instruments which an inquiry would have disclosed. The first class of cases enumerated by V. C. Wigram, in *Jones* v. *Smith* (1 Hare, 43, 55), to which he concedes the doctrine of constructive notice to extend, is "when the party charged has had actual notice that the property was incumbered or

affected, and the court thereupon bound him with constructive notice of *facts* and *instruments*, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property, of which he had actual notice."

And the rule, as extracted from the numerous authorities, is stated by SELDEN, J., in *Williamson* v. *Brown* (15 N. Y., 362), to be that when a purchaser has knowledge of any fact sufficient to put him on inquiry, as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser. This presumption, however, may be rebutted by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part.

The most obvious and natural inquiry to be made in this case would have been of Reed himself. Nunez was interposing between Reed and his wife for their mutual benefit; and it would have been the plain duty of Reed to have truly answered any inquiry Nunez might make as to the particulars of the incumbrances referred to. The presumption is that he would have done so. If he had given false information and Nunez had been misled thereby, after using due diligence to obtain correct information, he would have been excused. (*Williamson* v. *Brown*, 15 N. Y., 362.) Due diligence in such a case is the test of good faith. The whole doctrine of constructive notice, from recitals or references in deeds, is founded on the duty of the purchaser to use due diligence in examining the title. The omission to make the proper examination or inquiry is gross negligence, which prevents the purchaser from being regarded as *bona fide*. No inquiry whatever seems to have been made in the present case. If the natural and obvious inquiry was not even made of Reed, the vendor, it was one of the cases characterized in the authorities as willful blindness. The plaintiff did not even testify

that he had not notice of the incumbrance. (See *Hawley* v. *Conner*, 4 Cow., 741.) He threw upon the court the duty of determining the case from the legal presumptions arising upon the facts. Conceding that the burden of showing notice was, in the first instance, upon the defendants, yet enough had been shown to establish a *prima facie* case of notice, sufficient to put the plaintiffs on inquiry, which was conclusive unless rebutted; and, not having been rebutted, the finding that the plaintiffs were purchasers in good faith was erroneous.

The most natural interpretation of the whole transaction would seem to be that Mrs. Reed and her trustee agreed to take the property subject to whatever incumbrances Reed may have put thereon, reserving her right to contest their validity as against her, and trusting to Reed's personal covenant to discharge them within ninety days, and to the condition that, if he should fail to do so, she should not be bound by the instrument, so far as it released her claims to alimony. The deed declares that the acceptance of the property in satisfaction of Mrs. Reed's claims is on condition that Reed shall pay off the encumbrances within ninety days. The undertakings of Nunez are "in consideration of the premises." If the condition was broken the arrangement failed, and the covenants became inoperative. Reed became liable, as before, for the support of his wife, and could not hold Nunez to his covenant of indemnity against her debts. The covenants were made dependent. Nunez therefore incurred no liability which could make him a *bona fide* purchaser. Reed's failure to pay the mortgage would relieve Nunez from the conditional liability he had assumed.

It may be that Mrs. Reed can still maintain her title to the property, as against the defendant's mortgage, on the ground that the property was hers, and not her husband's. When husband and wife are living together, a gift to the wife by the husband of chattels, at the time in the possession of the husband, and in the house occupied by both, unaccompanied by any actual change of possession, would be clearly invalid

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as against creditors and purchasers. But if the chattels were bought for the wife, and brought into the house as her property, and notoriously recognized as such, never having been there as the property of the husband, we are not prepared to say that, in the absence of fraud, her title would not be valid, even as against creditors or purchasers from the husband, and stand upon the same footing as though she had herself made the purchases in her own name with funds given her by the husband. From the evidence, it would appear that the articles in question were notoriously purchased as presents for the wife, and placed in her possession as such. If so, we do not think it necessarily follows that because they were in the house, which she and her husband jointly occupied, they were in his possession, or legally subject to his control. This point is not, however, available to the plaintiffs on the present appeal.

The judgment must be reversed and a new trial ordered, with costs to abide the event.

All concur, except PECKHAM, J., dissenting.

GROVER, J., concurs upon the ground that the trustee was not a purchaser for value.

Judgment reversed.

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JOHN N. BULLIS et al., Assignees, etc., Appellants, v. HENRY B. MONTGOMERY et al., Respondents.

A requisition upon the sheriff in an action to recover the possession of personal property, only protects him in taking the property specified from the possession of the defendant named. Where, however, the actual possession remains in the defendant, although there has been a transfer of title and a constructive change of possession, the process is a protection.

One W. executed to plaintiffs, on a Saturday, an assignment of certain personal property for the benefit of creditors. On the Sunday following plaintiff B. obtained from one of W.'s workmen the keys of the shop where the property was, and that night B. went to the shop,

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unlocked and locked the door, but did not go in. Defendants, M. and S., commenced an action against W. to recover possession of the property, claiming to rescind a sale thereof to him for fraud. Under a requisition issued therein to defendant O., as sheriff, he took the property at 1 A. M. Monday. W.'s workmen left the shop as usual Saturday evening, and returning to resume work Monday morning, found the sheriff in possession. *Held*, that, as far as the sheriff was concerned, the property still remained in W.'s possession. Also *held* that declarations of W., made before his purchase of the property of M. and S., were not competent as evidence against plaintiffs, and that upon the examination of W. as a witness, questions as to whether he considered himself responsible, and whether he was of good credit at the time of the purchase, were proper.

(Argued November 18, 1872; decided November 26, 1872.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, setting aside a verdict in favor of plaintiffs, and granting a new trial. (Reported below, 8 Lans., 255.)

This action was brought by plaintiffs' assignees of one Walters to recover possession of certain blacksmith tools and iron, and other property, conveyed by the assignment.

The property was sold in January, 1867, by defendants, Montgomery and Sage, to Walters, upon a credit, they receiving his notes for the purchase-money.

Walters executed an assignment, for the benefit of creditors, to plaintiffs, on Saturday, February 23, 1867. The property was then in Prattsville, Greene county; the assignment was executed at Poughkeepsie. Bullis, one of the plaintiffs, went to Prattsville, arriving there Sunday afternoon. He found one of Walters' employes, and procured the key of the shop. He unlocked and locked the shop door that night, but did not go in.

Defendants, Montgomery and Sage, commenced an action to recover possession of the property, claiming to rescind the sale thereof, upon the ground that it was induced by fraudulent representations on the part of Walters. A requisition was delivered to defendant, Osborn, who was sheriff of Greene county, and by virtue thereof his deputy took the

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goods about 1 A. M. Monday morning. Workmen in the employ of Walters were at work at the shop till Saturday night, and went away expecting to return on Monday morning. They did so return, finding the sheriff in possession. Upon the trial evidence was offered by the defendants to prove, near the time of the sale by Montgomery & Sage to Walters, his declarations that he intended to cheat them out of the property. The evidence was excluded.

Walters was sworn as a witness for plaintiffs, and was asked whether, at the time of the purchase by him, he considered himself responsible and was of good credit. Motions were made to dismiss the complaint as to Osborn, upon the ground that he was sheriff, and only acted as expressly commanded by the process.

The jury rendered a verdict for plaintiffs. Exceptions were ordered to be heard at first instance at General Term.

John H. Reynolds for the appellants. The offer to prove the declarations of Walters was properly overruled. (*Cobb* v. *Hatfield et al.*, 46 N. Y., 533.) A witness charged with fraud may state whether, in a given transaction, he intended to defraud. (*McCracken* v. *Cholwell*, 8 N. Y., 133; *Seymour* v. *Wilson*, 14 id., 567; *Griffin* v. *Margaret*, 21 id., 121; *Forbes* v. *Waller*, 25 id., 430.) The sheriff was as liable for taking the property as the other defendants, and it was right for the jury to decline to discharge him. (*Stimpson* v. *Reynolds*, 14 Barb., 506; *King* v. *Orser*, 4 Duer, 431; *Kahlman* v. *Orser*, 5 id., 543; *Marsh* v. *Backus*, 16 Barb., 583.)

Samuel Hand for the respondents. The court erred in refusing to dismiss the complaint as to the sheriff, Osborn. (*Foster* v. *Pettibone*, 20 Barb., 350; *Shipman* v. *Clark*, 4 Den., 446; *Lavacool* v. *Boughton*, 5 Wend., 170; Morris on Replevin, 2d ed., 105; Code, § 216.) The court was wrong in excluding the evidence of Walters' declarations of his intent to defraud the defendants in the purchase of the property. (*Adams* v. *Davidson*, 6 Seld., 313; *Brown* v. *Brown*, 34 Barb.) They were admissible as part of the *res gestæ*.

(*Cary* v. *Sprague*, 12 Wend., 41; *Kimball* v. *Huntington*, 10 id., 175; *Woodhouse* v. *Jones*, 5 N. Y. L. R., 20; Cow. & Hill, 278, 279.)

FOLGER, J. First: Was the process in the hands of the deputy sheriff a protection to him against the action of the plaintiffs?

It is a familiar principle that process, regular on its face, issued by a court or officer having jurisdiction so to do, is a protection to a sheriff for acts done under it. (*Savacool* v. *Boughton*, 5 Wend., 170; *Sheldon* v. *Van Buskirk*, 2 Coms., 473.) This principle has been applied to the case of a sheriff acting in obedience to a writ of replevin; even to the extent of holding that the owner of goods taken by him may not maintain an action of trespass against him for taking them, when the writ ran against a third person having them in possession. (*Foster* v. *Pettibone*, 20 Barb., 350.) And it was intimated in *Shipman* v. *Clark* (4 Denio, 446) that such might be the effect of the sheriff acting under such a writ. And see *Miller* v. *Davis*, 1 Comyn, 590.

The reason of the doctrine maintained in 20 Barb. (*supra*) is taken from *Hallett* v. *Byrb* (Carthew, 380), where HOLT, Ch. J., says: "And so there is a difference between a replevin and another process of law, with respect to the officers; for in the first case, viz., in replevin, they are expressly commanded what to take in specie; but in writs of execution, the words are general, viz., to levy of the goods of the party, and therefore 'tis at their peril if they take another man's goods, for in that case an action of trespass will lie."

It is not necessary to say here whether the ruling in 20 Barb. (*supra*) is correct; for the reason given for it has ceased in this State.

The Code of Procedure, which in its provisions for the recovery of personal property is a substitute for the former action of replevin (*Nichols* v. *Michael*, 23 N. Y., 269), has changed the terms of the requisition upon the sheriff. They are no longer limited to a command what to take in specie.

The sheriff is now required to take the property specified, but with the further restrictive requirement to take the same from the defendant. So that the requisition has become more like to the command of an execution to levy of the goods of the party, and like to the command of a warrant of attachment to attach and safely keep all the property of the defendant. And it is held that a sheriff who seizes the goods of another than the defendant in the attachment is liable to the true owner in an action of trespass, (*Rogers* v. *Weir*, 34 N. Y., 463; and see *Commonwealth* v. *Kennard*, 8 Pick., 133, and *Driscoll* v. *Place*, 44 Vt., 252.)

The requisition in the case in hand, directed the sheriff that he take the property in question from Walters, the defendant in that action. It did not protect him, save in taking the property specified, from the possession of the defendant named. To that extent it would protect him. (*King* v. *Orser*, 4 Duer, 431.)

It is not claimed that the sheriff took any property other than that specified. It is claimed that he did not take it from the possession of the defendant named.

This was a question of fact. And if there was no testimony which would sustain the finding of a jury that he did not, the motion to dismiss the complaint as to Osborn should have been allowed.

Can it be said that there is sufficient proof that the plaintiffs were in the actual possession of the property when it was taken by the sheriff's deputy?

The proof from one of the plaintiffs was that Walters executed the assignment on a Saturday; that on the Sunday following, in the evening, he obtained from one of Walters' journeymen the keys to the shop in which was the property; that on the night of that day he went to the shop and tried the key to see if it fitted, and unlocked and locked again the door, but went only to the door, and did not go in. This is the only act of the plaintiffs' towards taking possession which is detailed in the testimony. It is true that the same witness, later in the case, says generally, that he "took possession of

the property the Sunday night I got keys of the *store*," which was the same Sunday night on which he got the keys of the *shop*. This saying went unexplained byany further examination, either direct or cross. If this general statement of the witness was merely his conclusion of what was the effect of the acts detailed by him of the locking and unlocking of the door, there was not in law a taking of actual possession by the plaintiffs, and as being more than the conclusion of the witness, it cannot fairly be construed. He had told what he did. He had said that he did not go into the shop; that he tried the key to see if it fitted; that he unlocked and again locked the door. His subsequent statement, that he took possession, did not add to these details. It is made as to the same time to which those relate. This was at night on Sunday; and at one o'clock on the morning of the next Monday the sheriff took the property by virtue of his process. A journeyman in Walters' employ, who left the shop on the Saturday night, did not know but that Walters was in possession until he returned to it on the Monday morning at seven o'clock, after the sheriff had taken the property. With the testimony thus, the motion was made in behalf of the sheriff that the complaint be dismissed as to him, on the ground that the act for which he, as such sheriff, was sued in this case, was an official act as sheriff and in obedience to the positive directions and requirements of the statute, and that he was not liable in the action.

This motion called on the court to decide whether in law, as the testimony was, the property was taken from the actual possession of the defendants in the process.

The decision of the court, denying the motion, was, in effect, that it was not. We think that this was erroneous. It is manifest that the property had not passed into the actual possession of the plaintiffs. So far as the sheriff was concerned in the execution of the process committed to him, it was still in the actual possession of Walters, whose agents had it in their control at the close of work on Saturday night, and who returned to resume that control on Monday morning, but found it in the custody of the sheriff.

The plaintiffs did indeed have a valid transfer of the title. It may be inferred that, with assent of Walters, they had the keys of the shop, the means of access to the property. They had a symbolical delivery and constructive possession. (*Hollingsworth* v. *Napier*, 3 Caines, 182, and note *a*, and *Dunham* v. *Pettee*, 8 N. Y., 508.) But the actual possession had not departed as yet from Walters.

In considering the testimony touching this point, we have not overlooked the return of the sheriff upon the requisition, in which he certifies that no one was in the actual possession of the property at the time. If this be taken literally, still he is not concluded by it, where his return is set up as his admission. It is then, but *prima facie*, and may be explained. (*Baker* v. *McDuffie*, 23 Wend., 289.) And the other testimony does explain it: It is plain that he meant that when he took the property into his custody, at the early hour on Monday, there was no one then present, exercising the immediate control of it.

Second. Were the declarations of Walters admissible in evidence?

Walters was a competent witness, and was not a party to the action. They were then hearsay evidence, and were not competent unless brought within some of the exceptions to the rule which forbids the use of such evidence. It is suggested that they were a part of the *res gestæ*.

But there is nothing in the case to sustain this. They were made before the sale of the property, not in the progress of the bargaining for it, not so far as appears in reference to an anticipated purchase or bargaining for it, nor while engaged in endeavoring to bring about a sale. In these respects, the case differs from *Crary* v. *Sprague* (12 Wend., 41) and other like cases cited by the defendants.

It is also suggested that there was such a privity between Walters and the plaintiffs, such an identity or community of interest, as made these declarations competent evidence.

There may be such a case (see DENIO, Ch. J., *Brown* v. *Mailler*, 12 N. Y., 118), but this is not it. It exists in the

case of an administrator, the declarations and admissions of whose intestate may be given against him.

But there is no such identity of interest between an insolvent assignor in trust for creditors and his assignee. The latter holds primarily for the creditors, and for these in hostility to the assignor. He does not represent merely or principally the assignor, nor hold chiefly for his interest and benefit, but rather for the creditors of the assignor, and is accountable in the first place to them. *Adams* v. *Davidson* (6 Seld., 313) is cited, but that goes no farther than to admit the declarations of an assignor while yet in possession of the assigned property. And its authority seems to have been doubted in *Cuyler* v. *McCartney* (40 N. Y., 221–235).

Third. Walters was asked when on the stand whether at the time of the purchase of the property he considered himself responsible, and whether he was of good credit. An objection was made to the question as a whole. It is now urged that it was improper to permit him to answer what was his credit. It seems to be conceded that it was proper to show his belief in his own pecuniary responsibility; and the question as to his credit does not differ. Each was to the purpose of showing that he did not intend to obtain the property fraudulently, inasmuch as, if he was responsible and of good credit, it needed not that he should have such purpose, or that he should falsely represent.

The order for a new trial should be affirmed against the plaintiffs, in favor of the defendant Osborn, with judgment absolute against them in his favor, in pursuance of their stipulation, with costs; and should be reversed as to the other defendants, with costs to the plaintiffs against them.

All concur. PECKHAM, J., not sitting.

Judgment accordingly.

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CHARLES A. MUSHLITT et al., Respondents, v. HENRY SILVERMAN, Appellant.

An act authorizing property to be encumbered without or against the consent of the owner, and without resort to legal process or judicial action, is an innovation upon the common law, and will not be extended in its operation beyond the fair and reasonable import of the words used.

One asserting a lien by virtue of a mechanics' lien law must bring himself within its terms, and the lien must be shown not only to have been regular and valid in its inception, but to be a continuing and subsisting one.

Plaintiffs sought to enforce a lien under the act giving mechanics and others liens for labor and materials furnished in the construction of buildings in the county of Kings. (Laws 1862, chap. 478.) Defendant proved the service of a notice upon plaintiffs, in pursuance of subdivision 4 of section 7 of said act, which declares that the lien shall be discharged by the omission of the lienor to file an affidavit of the issuing or service of a summons and complaint in an action to enforce the lien within thirty days after the time specified in a notice by the owner, requiring the commencement of an action for the enforcement of the lien on or before a specified day and hour. The action was commenced within thirty days after the specified time, but no affidavit of the issuing or service of the summons and complaint was filed within that period. *Held*, that the lien was discharged.

(Argued November 20, 1872; decided November 26, 1872.)

APPEAL from judgment of the General Term of the City Court of Brooklyn, affirming a judgment in favor of plaintiffs, entered upon the report of a referee.

This action was brought for the enforcement of a mechanic's lien in Kings county, created under chap. 478, Laws of 1862. The creation of the lien in accordance with the statute was conceded.

On the 13th of April, 1870, about 10 A. M., defendant served upon plaintiffs a notice requiring them on or before April 13th, 1870, at 12 o'clock noon, to commence an acton for the enforcement of their lien.

An affidavit of the service of such notice was filed in the office of the clerk of Kings county on the 28th May, 1870. The summons in this action was served on the 10th May, 1870, and issue was joined by the service of an answer on the

31st May, 1870. No affidavit from plaintiffs of the issuing or service of the summons and complaint in an action for the enforcement of the lien was filed within thirty days after filing of affidavit of service of notice. The referee held the neglect to file such affidavit did not discharge the lien, and directed judgment for sale of the premises. Judgment was entered accordingly.

J. T. Marean for the appellant. Where the lien expires at the end of a year by limitation, there can be no judgment for its enforcement unless recovered within the year. (*Grant* v. *Vandercook*, 57 Barb., 165; *Freeman* v. *Cram*, 3 N. Y., 305.) Every provision of the statute of mechanics' liens appearing to be for the protection of the owner, must be strictly construed in his favor. (Blackwell on Tax Titles, 265, and cases cited.)

Royal S. Crane for the respondents. The defence was merely technical, and should not be permitted upon an answer like the one in suit. (Code, § 177; *Hoyt* v. *Sheldon*, 4 Abb., 59; 6 Duer, 661.)

ALLEN, J. The act giving mechanics and others liens for labor and materials furnished in the construction of buildings in the county of Kings (Laws of 1862, chap. 478), in terms declares, that the lien shall be discharged by the omission of the lienor or claimant to file an affidavit of the issuing or service of the summons and complaint in an action to enforce the lien within thirty days after the day specified for the commencement of such action, in a notice which the owner is permitted to give, requiring an action to be commenced on or before a certain hour, on a day specified in such notice. (Act *supra*, § 7, sub. 4.) The act is so explicit in its terms that it admits of but one interpretation; and when the words of a statute have a definite and precise meaning, such meaning cannot be extended or restricted by conjecture, or under the guise or pretext of interpretation. It is not allowable to interpret that which has no need of interpretation. (*McClus-*

key v. *Cromwell*, 1 Kern., 593.) The natural and obvious meaning of the statute permits the owner to put the claimant in motion, to enforce his lien, by giving a notice specifying a time by which the action is required to be commenced. The action may perhaps be brought at any time during the continuance of the lien. But the claimant, to continue and preserve his lien beyond thirty days after the time specified in the notice for the commencement of the action, must file an affidavit that an action has been commenced; and if such affidavit is not filed, the lien is absolutely discharged.

When the act declares, as it does, that the lien may be discharged in any one of several methods, the happening of any of the events, or the performance of any of the acts mentioned, operate, *per se*, as a discharge, without the necessity of further acts by any person.

The lien claimed by the plaintiffs is the creature of statute, and depends solely for its validity upon the act creating it. The act is an innovation upon the common law, affecting property and rights of property, authorizing, as it does, property to be encumbered without or against the consent of the owner, and without a resort to legal process or judicial action. Such an act cannot be extended, in its operation and effect, beyond the fair and reasonable import of the words used; and the plaintiffs, asserting their lien, must bring themselves within its terms and the lien must be shown, not only to have been regular and valid in its inception, but to be a continuing and existing lien under the statute. This they have failed to do.

The referee has found that the plaintiffs did not file the affidavit of the commencement of the action within the time prescribed by the act. As the statute prescribes that as the condition of the continuance of the lien, the courts cannot dispense with it, or relieve the party from the consequences of his omission.

The judgment must be reversed and a new trial granted, costs to abide event.

All concur, GROVER, J., not voting.

Judgment reversed.

Statement of case.

IN THE MATTER OF THE PETITION OF WILLIAM B. ASTOR TO VACATE AN ASSESSMENT FOR PAVING FOURTEENTH STREET, ETC.

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A newspaper, appointed by the common council of the city of New York as an official paper prior to the passage of the amended charter of 1857 (chapter 446, Laws of 1857), in the absence of any subsequent action of that body, continued in that position, and the presumption is, in the absence of proof of such action, that it did so continue.

The provisions of the acts known as the tax levies for the city of New York for the years 1863 (chapter 227, Laws of 1863), 1867 (chapter 586, Laws of 1867) and 1868 (chapter 853, Laws of 1868), limiting the number of official papers to be employed, and selecting the officers of the corporation to designate them, fall within the general subject indicated by the title to those acts, that is, the raising of money for the support and government of that city and regulating the expenditure thereof, as their effect is to limit the expenditure; they are, therefore, not repugnant to the sixteenth section of article 8 of the Constitution, providing that no local or private bill shall embrace more than one subject, and that shall be expressed in the title.

These provisions being general in their nature, and not being restricted in their operations by the terms of the acts, remained in force until changed by the legislature.

Under the act of 1868 the New York Leader was selected as an official newspaper. There was no change made in 1869 either in the power to appoint or the appointment. A resolution and ordinance was adopted by the common council in 1869 for the paving of a portion of Fourteenth street with Nicolson pavement. This was not published in the Leader. *Held*, that the appointment of that paper, as an official newspaper, continued; and the proceedings not having been published as required by section 7 of the amended charter of 1857 (chapter 446, Laws of 1857), the assessment for the purposes of the work was void.

(Argued November 19, 1872; decided December 3, 1872.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, affirming an order of Special Term vacating an assessment for paving Fourteenth street in the city of New York, between Eighth and Ninth avenues, with Nicolson pavement.

The resolution authorizing the work was introduced in the board of aldermen September 6th, 1869, it was adopted by

Statement of case.

that board September 27th, 1869, and by the board of assistant aldermen October 4th, 1869, and approved by the mayor October 11th, 1869.

The New York Leader was appointed as one of the corporation papers by the common council in January, 1857. It was also designated as an official paper by the mayor and comptroller July 2d, 1863, by the comptroller July 1st, 1867, and by the mayor and comptroller December 3d, 1868. The resolution and ordinance authorizing the improvement were not published in the Leader.

John H. Strahan and *Richard O'Gorman* for the city of New York, appellant. The provisions of the tax levy acts for 1863, 1867 and 1868 are unconstitutional. (*The People* v. *Hill*, 3 N. Y., 449; *The People* v. *O'Brien*, 38 id., 193; *Gaskin* v. *Meeks*, 42 id., 186; *Huber* v. *The People*, decided in Court of Appeals, March 27th, 1872.) The confirmation of the assessment by the board of revision and correction of assessment was valid. (Laws of 1861, ch. 308, § 1; Laws of 1872, ch. 580, § 6.)

Charles E. Miller for the respondent. The resolution and ordinance were not published as required by section 7 of the charter. (*Matter of Douglas*, 1 Sickels, 42.) The tax levy acts of 1863, 1867 and 1868 are constitutional. (*Sun Mut. Ins. Co.* v. *Mayor*, 2 Seld., 252, 253; *Matter of Douglas*, 1 Sickels, 42; *The People ex rel. Thomas A. Davis* v. *The Commissioners of Taxes of the City of New York*, 2 Sickels, 501, 504.) The assessment has never been confirmed by the common council and should be vacated. (Valentine's Laws, 1191.) The act of 1861 is a local bill and violates the Constitution. (Valentine's Laws, 1190; Laws 1859, chap. 302, § 15; *Town of Fishkill* v. *Plank-road Co.*, 22 Barb., 634; *People* v. *Hill*, 35 N. Y., 449; *Baldwin* v. *Mayor*, 2 Keyes, 387, 392; *People* v. *O'Brien*, 38 N. Y., 193; *Smith* v. *Mayor*, 7 Robertson, 190; *Pullman* v. *Mayor*, 54 Barb., 169; *Gaskin* v. *Meeks*, 42 N. Y., 186; *People* v. *Commissioners of High-*

ways of Town of Palatine, 53 Barb., 70; *People* v. *Allen*, 3 Hand, 404–417; *People ex rel. Lee* v. *Board of Supervisors of Chautauqua County*, 4 id., 10.)

CHURCH, Ch. J. This is an appeal from an order of the General Term of the first department, affirming an order vacating an assessment against the petitioner for paving a portion of Fourteenth street. The principal point argued was as to the sufficiency of the publication of the action of the common council authorizing the improvement.

The seventh section of the amended charter of 1857 (chap. 446, Laws of 1857) provides, that "All resolutions and reports of committees which shall recommend any specific improvement involving the appropriation of money, or the taxing or assessing the citizens of the city, shall be published immediately after the adjournment of the board, under the authority of the board, in all the newspapers employed by the corporation, and shall not be passed until after notice has been published at least two days."

We held *In re Douglas* (46 N. Y., 42) that the provisions of this act requiring publication operated as a limitation upon the power of the common council to make assessments upon the citizens of the city, and that a failure to comply with the act in this respect rendered assessments void. The improvement in question was in 1869, under the provisions of this act. The proceedings were not published in the New York Leader; and the question is whether that paper was, at the time they took place, a newspaper "employed by the corporation." If it was, the assessment was void within the principle of the case *In re Douglas* (*supra*). There have been a variety of ordinances and acts of the legislature in relation to the designation and employment of newspapers for the publication of official notices in the city of New York, some of which it will be proper to refer to. At the time of the passage of the act of 1857 the Leader was employed, under an ordinance passed prior to the act authorizing the common council to designate seven newspapers to publish official

notices. The counsel for the appellant claims that this appointment was limited to the year 1857, and was abrogated by the amended charter of 1857. Although not very material, in the view I take of the subsequent acts, I am unable to appreciate the force of this objection. In the absence of any other mode of designation or employment, the common council possessed this power, and it was expressly conferred upon them by the act of 1857. The Leader being then an official paper, appointed by the common council, in the absence of any action of that body subsequently, would continue in that position, and, the presumption is, it did continue; and there is nothing in the act of 1857 inconsistent with its continuance. By chapter 227 of the Laws of 1863, commonly known as the tax levy of that year, it was provided that no portion of the sums thereafter raised by tax or assessment should be paid for official advertising, except in newspapers authorized by the mayor and comptroller, who were directed to designate, not to exceed, ten in all. In a similar act (chap. 586 of the Laws of 1867) the comptroller was directed to select three daily and three weekly newspapers, and the corporation was declared not to be liable for publication of official notices in any other papers.

In a similar act (chap. 853 of the Laws of 1868) it was provided that no payment for advertising official notices should be made, except to the newspapers designated by the mayor and comptroller, who were authorized to select a limited number wherein the proceedings of the common council were directed to be published. The Leader was duly selected as one of the papers to publish official notices under the acts of 1863, 1867 and 1868. In 1869 the tax levy contained no provision on the subject.

It is objected, first, that these acts violated the sixteenth section of the third article of the Constitution, which provides, that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." The title of the act of 1868 is "An act to make provision for the government of the city

of New York." The act of 1867 is a little more full, and expressly embraced in its title the expenditure as well as the raising of money; but, substantially, these acts, as well as that of 1863, are the same. The general subject indicated is the raising of means for the support of the government of New York, and regulating the expenditure thereof, and any provision which fairly falls within this general subject might be incorporated in the act; and the provisions in question are clearly of that character. They relate to the expenditure of the money authorized to be raised, and, in effect, limit such expenditure. Instead of an unlimited power to employ all the newspapers in the city, and thus create obligations to pay therefor, these acts restricted the number which might be employed, and selected the officers of the corporation to designate them. The transfer of power of designation from the common council to specific officers of the corporation is not a different and independent subject, but immediately connected with the expenditure of the money authorized to be raised. We may presume that the change was regarded as a check upon expenditure, and that the mayor and comptroller, or the latter alone, would discharge the duty more for the pecuniary interest of the city than the common council. It is sufficient that it is connected with the support of the government and the expenses incident thereto.

We have not hesitated to condemn acts in conflict with this provision of the Constitution; but in every case we have found such a substantial departure from the subject of the title as to bring it within the evils intended to be guarded against. It is not required that the details of an act should be incorporated in its title; and it is equally important not to construe the provision so as to embarrass legitimate legislation, as it is to give it full effect in cases where matters foreign to, and not indicated by the subject embraced in the title are inserted. It is also objected that the designation under these acts continued for the year only; and that the selection made in 1868 did not extend to 1869, when these proceedings were instituted. Assuming that the appropriations in these acts

are designed to pay the expenses for a single year only, yet provisions of a general nature connected with them are not limited in their effect to that period. State appropriations must be made every two years; and yet general provisions in such acts, applicable alike to all appropriations, continue in force until repealed. The general prohibition in the act of 1863 against paying sums raised by tax for advertising, except to newspapers selected by particular officers, and the modification of the mode of selection in the acts of 1867 and 1868, are not restricted in their operation by the terms of the acts, and remained in force until changed by the legislature. The selection made under the act of 1868 of the Leader as one of the official newspapers continued therefore through 1869, there having been no change either in the power to appoint or the appointment; and, collating the three acts with that of 1857, this would be so, although the particular appropriation in 1868 could not be applied for advertising after that year.

The power to select newspapers is unconditional, both in the acts of 1867 and 1868, and the official character of the newspapers selected is not limited by or dependent upon the particular fund appropriated by the act. That fund is applicable only to the payment to newspapers selected in a particular way; but the power to select is unqualified.

Lastly, it is objected that the designation of newspapers under the acts of 1863, 1867 and 1868 does not constitute an *employment by the corporation* within the meaning of the act of 1857 above quoted. This is not tenable. The designation or selection authorized by those acts is only another mode of employment from that prescribed by the act of 1857. By the latter, the common council, and by the former, specific officers were authorized to employ newspapers. "To employ" and "to select," or "to designate," as used in these acts, are synonymous.

Without considering the other questions, the order of the General Term, vacating the assessment, must be affirmed.

All concur.

Order affirmed.

Statement of case.

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FRANCES VOSE, Appellant, *v.* THE FLORIDA RAILROAD COMPANY et al., Respondents.

A sale by a creditor of collateral securities, placed in his hands by the principal debtor, in violation of a stipulation for a particular notice of sale contained in the contract under which they were pledged, does not, *per se*, discharge a surety *in toto* who is liable for the debt, but by such sale the creditor makes the securities his own to the extent of discharging the surety to an amount equal to their value.

(Argued November 18, 1872; decided December 3, 1872.)

APPEAL from a judgment at a General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of the defendants entered upon the decision of the court at Special Term.

The action was brought to recover a balance due on several promissory notes made by the Florida Railroad Company, and indorsed by Yulee, for which balance the other defendants were also claimed to be liable, by reason of transactions particularly detailed in the complaint.

In 1856, Joseph Finnegan & Co. contracted with the Florida Railroad Company to construct so much of the railroad of the latter as lay between Amelia Island, on the Atlantic, and Cedar Keys, in East Florida.

In the execution of the contract Joseph Finnegan & Co. contracted with Vose, Livingston & Co., a firm in New York, composed of the plaintiff and Edward Livingston and Charles L. Perkins, for the purchase of 8,000 tons of iron rails, to be delivered at Fernandina, in Florida.

The substance of this contract, so far as pertinent to the questions discussed, is set forth in the opinion.

Vose, Livingston & Co., under their contract, delivered a large quantity of iron rails at Fernandina, for which Joseph Finnegan & Co. gave their notes, indorsed in part by the defendant, Yulee, amounting to $154,632.22.

In May, 1858, Joseph Finnegan & Co. assigned their contract for the construction of said railroad to the defendant,

Dickerson, and his associates, who assumed the obligations of their assignors to Vose, Livingston & Co., and who were employed by the railroad company as contractors in the place of Joseph Finnegan & Co.

On the 31st of October, 1858, an agreement was entered into between the Florida Railroad Company and Vose, Livingston & Co., whereby the former, after various recitals, agreed to assume the obligations of Joseph Finnegan & Co., in their aforesaid contract with Vose, Livingston & Co., for iron rails, to give its notes for the aforesaid notes given by Joseph Finnegan & Co., with the indorsement of the defendant, D. L. Yulee, on such of its notes as should take the place of the notes he had indorsed—all the notes to be secured by a deposit of bonds of the railroad company, with a right to take any of the bonds in payment, at a rate specified, provided the railroad company should not, within thirty-six hours after notice, redeem such bonds, by paying the notes for which they should be security. In case of default the bonds might be sold to pay the notes,

The contract contained this clause: "The collateral securities now held by the parties of the second part for the payment of the notes of Joseph Finnegan & Co. shall be held by them as collateral security for the payment of said notes to be given by the parties of the first part, in the same manner and with the like effect as if such collateral securities had been originally deposited to secure the payment of the latter notes, and upon default in the payment of such notes the parties of the second part may sell such securities in their discretion, as provided in said paper A (the contract with Finnegan & Co.), and apply the proceeds upon such notes."

The same date, Edward N. Dickerson, assignee, executed a writing expressing a release by him to Vose, Livingston & Co., of all liability under the contract with Joseph Finnegan & Co., and consented and agreed that contract might be retained by Vose, Livingston & Co., as security for the notes to be given by the Florida Railroad Company.

In pursuance of said agreement, release and consent, the

railroad company made and delivered to Vose, Livingston & Co. thirty-three promissory notes, dated November 1, 1858, twenty-seven thereof payable to the order of the defendant, David L. Yulee, twenty-six of them being for $5,000 each, the other for $3,458.93, all amounting in the aggregate to $133,458.93, which were indorsed by the said Yulee at the time they were delivered to the said Vose, Livingston & Co. The said railroad company also deposited with Vose, Livingston & Co., as collateral security for the payment of the notes, 195 bonds of the railroad company for $1,000 each.

In 1860 the firm of Vose, Livingston & Co. was dissolved, and the interests of the firm were transferred to the plaintiff.

On or about the 13th December, 1865, the plaintiff commenced an action against defendant, the Florida Railroad Company, in the Supreme Court of this State, for the amounts due on said notes, and the sale of the said 195 bonds.

The said action was prosecuted to judgment, the bonds were sold by the sheriff of New York, and after applying the proceeds, less costs and expenses, there remained a balance due the plaintiff, February 1st, 1867, of $136,534.63.

In November, 1866, the trustees of the internal improvement fund of Florida took possession of and sold the railroad and property of the railroad company.

The property was struck off to the defendant, Isaac K. Roberts, and the deed on the sale was executed to "Edward N. Dickerson and his associates."

The associates of Dickerson were the other defendants. The court found as conclusions of law, among others, the following:

"That neither Edward N. Dickerson, Marshall O. Roberts, Isaac K. Roberts nor David L. Yulee is liable to Francis Vose for the notes of the original Florida Railroad Company or of Joseph Finnegan & Co."

That David L. Yulee is discharged from his liability to plaintiff as indorser of the notes of the Florida Railroad Company by reason of the sale by the plaintiff of the bonds

deposited as collateral security for said notes, without having given the notice of such sale required by contract.

"That the complaint must be dismissed as to all the defendants, with costs, to be taxed."

To which findings and conclusion the plaintiff duly excepted.

Theron R. Strong for the appellant. The cause of action against defendants is perfect. (*West* v. *Am. Ex. Bank*, 44 Barb., 178, 179; Code, §§ 149, 168; *Hey* v. *Bowles*, 33 How. Pr., 266.) The taking possession and sale of the railroad by the trustees of the internal improvement fund did not terminate the then existing, or create a new, corporation. (2 Bl. Com., 37; 2 Kent's Com., 267; *Dartmouth College* v. *Woodward*, 4 Wheat., 518; *'Bank of Augusta* v. *Earle*, 13 Peters, 595; *Beekman* v. *Saratoga and Schenectady R. R. Co.*, 3 Paige, 45, 75.) Under section 274 of the Code the plaintiff is entitled to a separate judgment against Yulee. (See *Armitage* v. *Pulver*, 37 N. Y., 494, 501; *Harrington* v. *Higham*, 15 Barb., 524, 528; *Paine* v. *Ladue*, 1 Hill, 116; *Eli* v. *Kilburn*, 5 Den., 514; *Brown* v. *Hill*, 1 Denio, 400; *Erwin* v. *Saunders*, 1 Cow., 249; *Lea* v. *Am. At. and Pa. Canal Co.*, 3 Abb. Pr. [N. S.], 1; see, also, *Slee* v. *Bloom*, 5 Johns. Ch., 367; *The Bank of Niagara* v. *Johnson*, 8 Wend., 645; *Wilde* v. *Jenkins*, 4 Paige, 481; *Russell* v. *McLellan*, 14 Pick., 63; *Revere* v. *The Boston Copper Co.*, 15 Pick., 351; *The Boston Glass Manufactory* v. *Langdon, etc.*, 24 Pick., 49; 2 Kent's Com., 312, etc., and notes; 4 Abb. Di. Law of Corporation, 290–296; *In re Rankin and Pullan* v. *Fla. At. and Gulf Cent. R. R. Co.*, Bankrupt Reg., 196, 197, 198, June, 1868.) The court erred in allowing evidence contradicting the legal import and effect of the indorsements by Yulee of the notes of Joseph Finnegan & Co. (See authorities before cited; *Paine* v. *Ladue*, 1 Hill, 116; *Ely* v. *Kilburn*, 5 Denio, 514; *Brown* v. *Hill*, 1 Denio, 400; *Erwin* v. *Saunders*, 1 Cow., 249.)

Edward N. Dickerson for the respondents. The old company is dead by the seizure and sale of its franchise. (*Mumma*

v. Potomac Co., 8 Peters, 285; *Comm.* v. *Cen. Passage Railway*, 52 Penn. State, 506.) The defence that the indorsement by Yulee was given for a specific purpose and not to create an absolute contract of liability is good under the Code. (*Despard* v. *Walbridge*, 15 N. Y., 375; *James* v. *Johnson*, 6 Johns. Ch., 417; *Miller* v. *Henderson*, 10 Serg. & Rawle, 290.) The sale of the bonds without notice discharged the indorsee. (*Markham* v. *Jaudon*, 41 N. Y., 239; *Wheeler* v. *Newbold*, 16 id., 395; *Wilson* v. *Little*, 2 id., 443.)

ANDREWS, J. By the contract made between Vose & Co. and Finnegan & Co., for the sale by the former to the latter of iron, to be used in the construction of the Florida railroad, the contractors agreed to deposit with Vose & Co. first mortgage bonds of the Florida Railroad Company, guaranteed by the internal improvement fund of the State of Florida, and also Freeland bonds of the company, as security for the payment of the purchase-price of the iron to be delivered under the contract.

The payment for 2,000 tons of the iron was to be further secured by the notes of the contractors indorsed by the defendant Yulee.

The contract contained a provision that if the notes should not be paid at maturity, the holder should be authorized to sell the bonds at the brokers' board, or at public or private sale, on giving five days notice to Messrs. Riggs & Co. of New York, "except those deposited with notes indorsed by D. L. Yulee, the defendant, for which thirty days notice to J. T. Souter, New York, is to be given before sale."

By the contract of the 31st October, 1858, between Vose & Co. and the Florida Railroad Company, the notes of the company indorsed by the defendant Yulee were to be substituted for the notes of Finnegan & Co., indorsed by him, then held by Vose & Co., and it was provided that the securities held by Vose & Co. as security for the latter notes should remain as security for the notes to be substituted therefor, and that upon default in their payment the securities might be

sold by Vose & Co. as provided in the contract with Finnegan & Co., and the proceeds applied upon the notes.

The latter contract was assented to by the parties representing Finnegan & Co., and it in substance limited the authority to sell the collateral securities, as in the original contract.

The referee found that, bonds deposited as security under the contract of Finnegan & Co. were sold by Vose & Co. without giving the notice required thereby, and that by such sale without notice the defendant Yulee was discharged from his liability as indorser.

Assuming that the fact found by the referee was authorized by the evidence, the question arises whether a sale by a creditor of securities for the debt, placed in his hands by the principal debtor, in violation of a stipulation for a particular notice contained in the contract under which they were pledged, discharges *per se* a surety who is liable for the debt.

The defendant Yulee indorsed the notes for the accommodation of Finnegan & Co., and was a surety and entitled to the protection of the rules of law applicable to that relation. (*Pitts* v. *Congdon*, 2 Comst., 352.)

The rule is well settled that the creditor cannot, without the assent of the surety, by any agreement with the principal, change the contract, or affect the remedies of the surety against the principal debtor, without discharging the surety.

If the creditor releases the principal debtor, the surety is discharged, because he is thereby deprived of any remedy over in case of the payment of the debt by him, and the obligation of the surety is in general only coextensive with that of his principal, and if the time of payment is extended he is discharged, because the remedy of the surety thereby becomes more uncertain, and to continue his liability would be to hold him to the performance of a contract to which he has not assented. (Theobald on Principal and Surety, 152.)

Where collateral securities are held by the creditor for the debt, he holds them in trust for the surety, who is entitled to their benefit, and to have them applied in extinguishment

pro tanto of his liability, and he is entitled to the benefit of any stipulations made between the creditor and the principal debtor, designed to prevent their sacrifice. And in case of the payment of the debt by the surety, he has the right of substitution, and can compel the creditor to assign them for his indemnity.

The creditor has no right to release or discharge the securities, and throw upon the surety the burden of the debt which might otherwise have been paid in whole or in part out of the property of the person primarily liable.

The decision of the court in this case proceeded upon the ground that the sale of the bonds by Vose & Co., without the notice provided in the contract, worked an absolute discharge of the surety irrespective of the value of the bonds, and operated to the same extent upon his rights as if the contract upon which he was liable had been changed without his assent. We do not think that this position can be maintained upon principle or authority.

When the contract upon which the surety is liable has been changed by an extension of the time of payment without his assent, the court will not inquire whether actual injury has resulted to him. That inquiry would be a difficult one, and in many cases would not depend upon the fact of the solvency of the principal at the time when the original contract matured.

In this case the creditor meddled with the securities in a manner contrary to his stipulation, and he should be held to have made them his own to the extent of discharging the surety to an amount equal to their value.

The act of the creditor did not change the contract upon which Yulee was surety, and the rights of all parties will be fully protected if it shall be held that the debt was discharged to the extent of the value of the bonds sold in contravention of the contract. It is not difficult to measure the loss actually sustained by the conversion, or misapplication by the creditor of the securities in his hands. It would be contrary to equity to discharge the surety *in toto* in consequence of a

release by the creditor of a security without reference to its value. The authorities confirm this view of the rights and obligations of the respective parties. (Story Eq. Jur., § 326; *Capel* v. *Butler*, 2 Sim. & Stu., 457; *Law* v. *East India Co.*, 4 Ves., 833; *Payne* v. *Com. Bank of Natchez*, 6 Smedes & Mar. 24; Neff's Appeal, 9 W. & S., 36.)

We are, therefore, of opinion that the surety was discharged by the sale of the bonds in this case to the extent only of their value, and that the decision cannot be supported upon the ground upon which it was placed by the court.

It is now claimed that the complaint was properly dismissed as to the defendant Yulee, for the reason that the action was not brought to enforce his liability as indorser, and that a recovery against him in that character was not authorized by the case made by the complaint, and was not within the relief demanded. The foundation of the action was the debt owing to Vose & Co. For this debt the notes of the Florida Railroad Company had been given, indorsed by the defendant Yulee, upon which judgment has been recovered against the corporation.

The complaint alleges the making and indorsement of the notes, and generally all the facts essential to charge the indorser.

The other defendants were charged in the complaint with liability for the debt, upon the ground, among others, that they had assumed its payment.

No special relief was asked against the defendant Yulee; but the issue as to his liability as indorser was made, tried and decided, and no question of misjoinder of parties or of causes of action was made at any stage of the litigation. It is now too late for the defendant Yulee to interpose an objection to a recovery based on the form of the action or the failure to demand specific relief against him as indorser. (Code, § 275; *Marquat* v. *Marquat*, 12 N. Y., 336; *Belknap* v. *Sealey*, 14 id., 143; *Greason* v. *Keteltas*, 17 id., 491.)

The judgment in favor of the defendant Yulee is also sought to be supported on the ground that the referee having

found that bonds in amount nominally exceeding his liability as indorser were deposited as security for the debt, and that Vose & Co. disposed of them without authority, it is to be presumed in support of the judgment that they were of value equal to their face, and that in consequence, upon the principle already adverted to, the liability of the indorser was extinguished. Bonds and negotiable instruments, as against a wrong doer, who has converted them, will in the absence of specific proof be presumed to be worth the amount secured by them.

But the referee in this case did not pass upon the question of the value of the bonds. His conclusion is not based upon the fact that they were of equivalent value to the debt, but distinctly upon another ground, viz.: that the sale without notice *per se* discharged the indorser.

The fact found by the referee affords, in the absence of other evidence, a presumption from which a fact not found might be inferred, but the fact found does not support the judgment, and by reference to the evidence it is clear that the referee would not have been justified in finding that the value of the bonds was equal to the debt.

It would be unjust to sustain the judgment on a ground not suggested or passed upon, and unsupported by the proof. But there is another answer to this claim. The stipulation requiring thirty days notice of the sale applied only to bonds held by Vose & Co., as security for the notes of Finnegan & Co., at the time when the contract between Vose & Co. and the Florida Railroad Company was made.

The bonds sold by Vose & Co. were deposited with them, after the contract with the corporation was made, and were not held subject to the stipulation as to notice. These bonds were sold in proceedings against the Florida Railroad Company, and the amount for which they were sold was credited on the debt for which the defendant Yulee was liable.

It does not distinctly appear what securities were held by Vose & Co. when the stipulation for notice was made, but the evidence authorizes the inference that securities were then

Statement of case.

held by Vose & Co. under the contract with Finnegan & Co.

The judgment dismissing the complaint against the Florida Railroad Company must be affirmed. It appears from the complaint that judgment had been obtained by Vose & Co. upon the debt against the corporation, and no relief is asked, nor do the facts disclose any ground for relief against the company. Whether the property purchased on the sale by the State of Florida, of the franchise and assets of the company, remains liable for the debt of Vose & Co., can be properly determined when they shall attempt to enforce the debt in the courts of the State where the property is located.

The judgment should be reversed as to the defendant Yulee and affirmed as to the other defendants.

All concur except ALLEN and GROVER, JJ., not voting.

Judgment accordingly.

HENRY D. BROOKMAN, Respondent, *v.* ROBERT W. MILBANK, impleaded, etc., Appellant.

In an action upon a promissory note, tried by the court, where the defence is one not available as against a *bona fide* holder, in which position plaintiff claims to stand, after the receipt of all the evidence as to the *bona fides* of the transfer to plaintiff, and an announcement upon the part of the defendant that he has no more to offer upon that subject, if in the opinion of the court the testimony establishes the fact that plaintiff is a *bona fide* holder, it is not bound to receive the evidence offered to sustain the defence, and the decision cannot be reviewed by this court, although enough was shown to have required the submission of the question thus determined to a jury, had the case been tried by a jury. (*Scofield* v. *Hernandez*, 47 N. Y., 318, distinguished.)

(Argued November 22, 1872; decided November 26, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of plaintiff entered upon the decision of the court upon trial at circuit, without a jury.

Opinion of the Court, per PECKHAM, J.

This action was brought upon a promissory note made by defendants, Graham, Whitfield and Robert Milbank, to the order of defendant, Robert W. Milbank, and by him indorsed to Frederick Brookman, by whom it was transferred, before maturity, to plaintiff. The answer of defendant, Robert W. Milbank, alleged that the note was given and indorsed by him under an agreement that a claim of the indorsee against the makers, to arrange which the note was given, should be assigned to him, which agreement the indorsee had failed to fulfill. The facts pertinent to the questions decided appear in the opinion. The court directed judgment for the plaintiff, which was entered accordingly.

Henry E. Knox for the appellant. Delivery of a check does not operate as payment of a previous debt. (*Bradford* v. *Fox*, 38 N. Y., 289; *Kelty* v. *Second Nat. Bank of Erie*, 52 Barb., 328; *Smith* v. *Miller*, 6 Abb. Pr. R. [N. S.], 234; *Tanner* v. *Bank of Fox Lake*, 23 How. Pr., 399; *Lovett* v. *Cornwell*, 6 Wend., 369; *Genin* v. *Tompkins*, 12 Barb., 265.)

George G. Reynolds for the respondent.

PECKHAM, J. The note in suit was dated January 13th. 1868, for $4,066, at one year, to the order of R. W. Milbank, and made by Graham, Milbank & Whitfield. On the 28th of said January, as the plaintiff testified, the note, indorsed by R. W. Milbank, was presented and delivered to the plaintiff by his brother, then the holder and owner, was discounted by him, and the plaintiff's check for the amount given to his brother. On the first of February following, the plaintiff's brother returned the check to the plaintiff, delivered it to him as money on deposit, and took a receipt from him for the amount, as "borrowed money, to be returned on demand." He further testified that he paid this money, with five per cent interest, but a few days prior to the trial of this cause, upon demand made by his brother, in a check upon the bank, which he supposed had been paid by the bank; that although he had not the full amount of the check in the bank when he

gave the first check, he had no doubt the bank would have paid it, if presented, as he had before overdrawn for larger sums, which had been paid. It appeared from his evidence that he was a man of large means, had large sums on deposit in the trust company, and could have met this check at any time; that his firm, of which he was the substance, had been in the habit of receiving money from his brother on deposit, payable on demand, at a reduced rate of interest, until demanded; that he took this note in good faith, never heard of any pretended defence, and there was no understanding of any kind contrary to his statements of the whole transaction; none that the check should not be presented. This is the substance of the case. Upon this evidence the defendant, R. W. Milbank, proposed to prove his defence stated in his answer. The judge before whom the cause was tried, without a jury, then inquired of the defendant's counsel if he had any further evidence as to the plaintiff being a *bona fide* holder of the note. Upon his replying in the negative, the court overruled the offer. Exception.

Was the plaintiff a *bona fide* holder? If the facts are as stated—if there was no understanding to the contrary—if the whole machinery were not a mere form, without any intent to transfer the title, then the plaintiff was a *bona fide* holder. This is scarcely denied; but it is insisted that the transaction, as presented, was very suspicious, and that a jury might have found that it was mere formal machinery, and no actual, *bona fide* transfer, and hence that the judge should have received the evidence, although he might be authorized, in his final consideration of the case, to reject it, and hold the plaintiff to be a *bona fide* holder.

It may be admitted that the evidence presented a suspicious case; that there was but little preponderance either way upon the question of the *bona fides* of the transaction, yet that question must be decided by the judge at trial, when he has no jury, and usually it can be decided much more wisely by him who has the witnesses before him than by an appellate court. This court cannot review the decision of the

judge upon the question of the credibility of this testimony.

Nor do I think the judge was bound to receive this offered evidence, when he was of opinion that the testimony showed the plaintiff to be a *bona fide* holder, even though we should conclude that enough was shown to submit that question to a jury, had the case been tried before a jury.

We are referred to the case of *Schofield* v. *Hernandez*, (47 N. Y., 313), as sustaining a contrary position. That does not go to the extent here claimed. Here the judge was properly called upon to decide the question of fact whether the testimony of the plaintiff was true, to pass upon this question of fact and its effect. The defence, too, was inquired of whether there was any more evidence touching the *bona fides* of the plaintiff's holding. The answer being given in the negative, the whole case as to that point was then before him, and its decision was properly made at that time.

The judgment should be affirmed.

All concur.

Judgment affirmed.

BETSEY AMELIA HART, Respondent, *v.* JOHN B. WANDLE et al., ELIZABETH SLOCUM, Respondents, and JAMES MALCOLM, Appellant.

Although a case contains no findings of fact or exceptions, if the judgment below is materially modified by the General Term the party injuriously affected by the modification has the right, upon appeal to this court, to a review of the question as to the correctness of the modification.

Plaintiff was the owner of a mortgage covering a farm which was subsequent to the execution of the mortgage sold to B.; B. executed a mortgage thereon to Q. for $1,200. He then sold seventy-seven acres thereof to C. He conveyed the residue, excepting twenty acres, to H. S., subject to plaintiff's mortgage and another, both of which H. S. agreed to pay. H. S. gave back a mortgage to secure $3,500 of the purchase-money, containing a proviso that no part of the sum secured should become due or payable until all liens and incumbrances not assumed by the mort-

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gagor should be paid and discharged of record. The twenty acres excepted were upon the same day conveyed by B. to E. S. This deed was made subject to the same mortgages referred to in the deed to H. S. Q. foreclosed his mortgage by action. Plaintiff was not made a party. Under the judgment therein the portion conveyed to H. S. was sold, subject to all incumbrances prior to Q.'s mortgage, the purchaser assigned his bid to M., who received the sheriff's deed. In an action to foreclose plaintiff's mortgage, M. claimed that the twenty acres sold to E. S. should be sold first, upon the ground that Q.'s mortgage was *pro tanto* an alienation of the property; that he, as purchaser, acquired the rights of the mortgagee and that the conveyance under the foreclosure of that mortgage related back to the date of the mortgage and was to be regarded as a conveyance prior to that of E. S. *Held*, that in the absence of proof to the contrary, it must be presumed that the sale upon the foreclosure of Q.'s mortgage was conducted in accordance with the judgment directing it, and that such judgment directed the lands conveyed to H. S. to be first sold; that they were, in equity, liable to be so sold, as H. S. had in his hand an amount of the purchase-money sufficient to pay that mortgage; that they were also primarily liable for the payment of plaintiff's mortgage, and when they were sold, subject to this incumbrance, the inference is they were sold subject to the entire burden thereof; and that therefore the judgment herein should direct that such lands, now the lands of M., be first sold.

(Argued November 22, 1872; decided November 26, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial district modifying, and affirming as modified, a judgment in favor of plaintiff entered upon decision of court at Special Term.

This is an action brought to foreclose a mortgage of $5,000, held by the plaintiff, Betsey Amelia Hart, on premises in Rockland county, in this State.

The facts are as follows: "The defendants, Wandle and Westervelt, were the former owners of the mortgaged premises, and executed the mortgage held by plaintiff. In 1852 they sold and conveyed to John N. Billings. In August, 1857, Billings made a second mortgage on the entire farm, to one Quackenboss, to secure about $1,200. In April, 1858, he mortgaged 201 acres of the farm to the president of the Troy City Bank to secure $5,000. In April, 1859, he sold the portion not covered by the last mentioned mortgage to the defend-

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ant, Coman. In November, 1859, he conveyed the remainder, except twenty acres, to the defendant Hiram Slocum, subject to the payment of the plaintiff's mortgage and the $5,000 mortgage to the Troy City Bank, which Slocum assumed. For a portion of the purchase-money Slocum executed to Billings a mortgage covering the land conveyed, conditioned to pay $3,500 as therein expressed, and containing this clause: "But that it is hereby expressly agreed and understood that no part of the said sum or interest shall become due or payable until all liens and incumbrances existing on said premises or any part thereof, excepting" the two mortgages, *i. e.*, plaintiff's, and the one to the Troy City Bank, "are fully paid, satisfied and the mortgaged premises discharged therefrom," which said liens the mortgagee agreed to pay and discharge.

On the same day Billings conveyed the twenty acres excepted from the last conveyance to Elizabeth Slocum, wife of Hiram Slocum, subject to the same mortgages.

In 1861, Quackenboss brought an action to foreclose his mortgage. Under a decree in that action, the property was sold at public auction to one John Disbrow for about $1,600. The property sold was all that part of the farm in New York State, excepting the portion sold to Coman and Mrs. Slocum, viz., the property sold to Hiram Slocum.

Disbrow assigned his bid to defendant, Malcolm, to whom the sheriff's deed was executed and delivered in December, 1861.

It appears from the evidence that at the sheriff's sale the terms of sale excluded the portions of the property conveyed to Coman and Slocum, and stated that the property would be sold, subject to encumbrances, prior to the Quackenboss mortgage. The sheriff's deed followed the terms of sale.

The court at the Special Term decided that the land of the defendant Malcolm (formerly Hiram Slocum's) must be first sold to pay the plaintiff's principal, interest and costs, the costs of the defendant Sloat, and the sum of $1,178.75 to the defendant Malcolm; that being the sum applied upon the former foreclosure and sale to the payment of the Quacken-

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boss mortgage and the costs of foreclosure, and that if a sufficient sum was not realized upon the sale of Malcolm's property to pay these various amounts, then that the land of the defendant Elizabeth Slocum be sold, and if that was not sufficient, then the land of the defendant Coman. From this decree the plaintiff, and defendants Malcolm and Elizabeth Slocum appealed to the General Term.

The General Term affirmed so much of the decree of the Special Term as directed the land of the defendant Malcolm to be first sold, but modified the rest by striking from it so much of it as directed that if necessary the lands of Elizabeth Slocum and Coman be sold to reimburse Malcolm to the extent of $1,178.75, and also charged him with the costs of the plaintiff and the defendant, Elizabeth Slocum, upon the appeals.

F. G. Salmon for the appellant. Malcolm is entitled to protection as against Elizabeth Slocum and Coman to the extent of $1,178.75, paid to satisfy the Quackenboss mortgage. (*Butler* v. *Veile*, 44 Barb., 166; *Holden* v. *Sackett*, 12 Abb., 473; *Kellogg* v. *Rand*, 11 Penn., 59; *La Farge F. Ins. Co.* v. *Bell*, 22 Barb., 67; *White* v. *Evans*, 47 id., 179; *Smith* v. *Gardiner*, 42 id., 366, per DANIELS, J.; *Butler* v. *Veile*, *supra*; *De Haven* v. *Lundell*, 31 Penn., 124, per THOMPSON, J.) Plaintiff's mortgage does not affect Malcolm's position. (*Russell* v. *Pistor*, 7 N. Y., 175.)

C. Frost for the respondents. The Quackenboss mortgage was not an alienation of the title. (3 Robertson, 201; *Stoddard* v. *Hart*, 23 N. Y., 560; *Kellogg* v. *Smith*, 26 id., 18.) Appellant's deed relates back only to the time when he became entitled to a conveyance. (*Pierce* v. *Hall*, 41 Barb., 146; *McLaren* v. *The Hartford Fire Ins. Co.*, 1 Seld., 151; *Gates* v. *Smith*, 4 Edw. Ch. R., 702.) The fact that Disbrow purchased with full knowledge of all the circumstances is material in determining the equities of the parties. (*Gill* v. *Lyon*, 1 J. Ch., 447.)

Opinion of the Court, per GROVER, J.

GROVER, J. The case contains no findings of fact by the Special Term, and no exceptions to any legal conclusions. It shows that by the stipulation of the parties the testimony was taken by a referee and reported to the court. Objections were taken before the referee to some of the testimony, but whether these were renewed before the court or any ruling thereon made, does not appear. Had the judgment of the Special Term been affirmed by the General Term, no question would have been raised for review by this court, as there was no exception taken to any ruling of the former. (*Stratton* v. *Cornfield*, 2 Keyes, 55.) But the judgment of the Special Term was modified adversely to the appellant by the General Term, and affirmed as so modified. To this modification the appellant has had no opportunity to except, and its correctness may therefore be reviewed upon this appeal. By that modification the lands of the respondent, Mrs. Slocum, were relieved from liability to pay the appellant that portion of the purchase-money paid by him upon the purchase made at the foreclosure sale upon the Quackenboss mortgage, which was applied to its payment. The question is whether her lands, from the facts appearing in the case, were shown to have been subject to this liability. This question does not concern the plaintiff, as her mortgage covered all the lands of Mrs. Slocum and the appellant, together with seventy-seven acres conveyed by Billings to Coman. Billings, while the owner of all the land subject to the plaintiff's mortgage, first gave the mortgage to Quackenboss. He next gave a mortgage to the Troy City Bank, upon all the land except seventy-seven acres, which he afterward conveyed to Coman. After the conveyance to Coman he conveyed twenty acres to Mrs. Slocum, subject to the mortgage of the plaintiff and the Troy City Bank. Upon the same day he conveyed the residue of the land to Hiram Slocum, subject to the same mortgages which Slocum covenanted to pay, which covenant was inserted in the deed to him. This made this land, as to Mrs. Slocum and Coman, first liable for the payment of the plaintiff's mortgage and that of the Troy City Bank, and this liability extended to his grantees.

(*Russell* v. *Pistor*, 7 N. Y., 171.) But this did not affect the liability of the land for the payment of the Quackenboss mortgage as to this land of Mrs. Slocum, continued equally liable with that conveyed to Mr. Slocum, both being liable prior to that of Coman, as his conveyance was prior to theirs. Hiram Slocum, upon the conveyance by Billings to him, gave Billings a mortgage upon the land for $3,500, containing the following clause: "But that it is hereby expressly agreed and understood that no part of the said sum or interest shall become due or payable until all liens and incumbrances existing on said premises or any part thereof, excepting two mortgages amounting to $10,000, on which there is that amount due, held by Smith, of Nyack" (plaintiff's mortgage meaning), "and of the same amount, viz., $5,000, held by the Troy City Bank, are fully paid and satisfied and the said premises discharged therefrom, which said liens and incumbrances the said party of the second part hereby agrees to fully pay, satisfy and discharge," and which mortgage shows that it was given for a part of the purchase-money of the land. It thus appeared that Slocum retained in his hands an amount of the purchase-money more than sufficient to pay the Quackenboss mortgage. Under this state of facts, payment by Slocum of the latter mortgage or its collection out of his land would have given him no right of contribution from the lands conveyed to Mrs. Slocum. It thus appears that, as to the latter, the land conveyed to Hiram Slocum was the primary fund for the payment of the plaintiff's and Quackenboss' mortgages. This was so held by both the Special and General Term, but the former held that the appellant acquired by his purchase at the foreclosure upon the Quackenboss mortgage the equity of the mortgagee, to be regarded as grantee of Billings, the mortgagor *pro tanto*, as of the date of his mortgage, and entitled to enforce such right against the lands of Mrs. Slocum for the amount paid upon the mortgage. For the purpose of determining the equity between the respective owners of parcels of land subject to an encumbrance upon all, a mortgage is to be regarded as an alienation, *pro tanto*, at the time of its date. (*Kellogg* v.

Brand, 11 Paige, 60; *La Farge Fire Ins. Co.* v. *Bell*, 22 Barb., 67.) The purchaser at a foreclosure sale acquires the title which the mortgagee had at the date of the mortgage. (*De Haven* v. *Landell*, 31 Penn., 120; *White* v. *Evans*, 47 Barb., 180.) In addition to this, he acquires all the rights of the mortgagee given by the mortgage in respect to the land. We have seen that the mortgagee acquires, *pro tanto*, the equity of a grantee, as of the date of his mortgage. It follows that a purchaser at a foreclosure sale acquires the same right. The payment of the mortgage given to the Troy City Bank by Mrs. Slocum cannot affect this equity, as that mortgage was given by Billings subsequent to the Quackenboss mortgage, and could not affect his rights as mortgagee. From these facts, the Special Term were clearly right in holding that in case the lands conveyed to Hiram Slocum did not upon sale produce a sum sufficient to pay the sum due upon the plaintiff's mortgage and the costs, and to the appellant the sum paid by him upon his purchase of these lands which was applied to the payment of the Quackenboss mortgage, the lands conveyed to Mrs. Slocum should be next sold, and from the proceeds the above payment should be made. But evidence was given that the premises were sold pursuant to written terms, by which it appears that they were sold subject to all incumbrances previous to the plaintiff's (Quackenboss') mortgage, and the deed given by the sheriff to the appellant recites that the premises were subject to the incumbrances prior to Quackenboss' mortgage. The plaintiff in this action, not being a party to that foreclosure suit, the premises sold would have continued subject to her incumbrance in the absence of the terms of sale or the recital in the deed. There was no proof of any incumbrance prior to the Quackenboss mortgage other than the mortgage of the plaintiff. The sheriff, in the absence of proof to the contrary, must be presumed to have conducted the sale in accordance with the judgment directing it. Upon this presumption, the lands conveyed to Hiram Slocum were directed to be first sold to satisfy the Quackenboss mortgage. We have seen that they were in equity liable for

this purpose prior to the lands of Mrs. Slocum, for the reason that he had in his hands an amount of the purchase-money sufficient for this purpose. But they were also primarily liable for the payment of the plaintiff's mortgage. When they were adjudged to be sold subject to this encumbrance, the inference is reasonable that they were to be sold subject to the entire burden in that respect then resting upon them. Of this Quackenboss had no cause of complaint, because if, when so sold, enough was not produced to satisfy his mortgage, the land of Mrs. Slocum was to be sold for that purpose. In this view, the terms of sale and the recital in the deed were appropriate. In any other, they were entirely useless. This must have been the conclusion of the General Term upon which the modification of the judgment of the Special Term was based. There was some other testimony given bearing upon this question. As to its competency (no exception having been taken) or force, I shall not inquire; upon the ground that the land was so sold upon the Quackenboss foreclosure.

The judgment of the General Term should be affirmed, with costs.

All concur.

Judgment affirmed.

ISAAC C. OGDEN et al., Respondents, *v.* THE EAST RIVER INSURANCE COMPANY, Appellant.

Where a specific parcel of property is insured by a policy containing the usual clause providing for an apportionment of the loss in case of other insurance, and the same property is covered by another policy, which also includes other parcels, all insured together for an entire sum, this constitutes other insurance within the meaning of such clause. (*Howard Ins. Co.* v. *Scribner*, 5 Hill, 298), overruled.

In case of total loss of all the property covered by the latter policy, the sum insured thereby is to be distributed among the several parcels in the proportion which such sum bears to the total value of all the parcels, and the portion allotted to the parcel specifically insured is to be considered the amount of additional insurance.

If such portion, together with the amount of the specific policy, is less

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than the value of the parcel, there being no over insurance, there is no occasion for any apportionment.

(Argued November 21, 1872; decided December 3, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiffs, entered upon a verdict.

The action was brought upon a policy of insurance issued by defendant to plaintiffs for $3,000 on plaintiffs' stock in trade, "contained in the three-story brick building known as No. 392 Washington street, in the city of New York." Other insurance was permitted without notice until required.

The policy contained a provision that "in case of loss the insured shall not recover on this policy any greater proportion of the loss or damage sustained to the subject insured than the amount hereby insured shall bear to the whole amount insured on the said property."

The plaintiffs, at the time of the fire, held fourteen other policies, issued by various companies, to the amount of $47,500, covering said property in No. 392 Washington street and a large amount of other property owned by plaintiffs. On the 30th November, 1864, all the property insured and covered by said fifteen policies was destroyed by fire. The value of the entire property so destroyed was $88,788.83. The value of the property covered by defendant's policy was $16,305.89.

The court upon trial directed a verdict in favor of plaintiffs for the full amount of the policy and interest, which was rendered accordingly.

Charles Tracy for the appellant. The clause of the policy limiting defendant's liability is a part of the contract of insurance, and absolutely limits plaintiffs' right of recovery. (*Blake* v. *Exch. Mut. Ins. Co.* 78 Mass., 265, 270, 272 [A. D. 1858]; *Lucas* v. *Jefferson Ins. Co.*, 6 Cow., 635; *Howard Ins. Co.* v. *Scribner*, 5 Hill, 298; Phil. on Ins., No. 366, chap. 3, § 15; *Haley* v. *Dorchester Mut. Ins. Co.*, 12 Gray, 545; *Lycoming, etc., Co.* v. *Stacklomm*, 3 Grant's Cases, 207; *Mut. Safety Co.* v. *Hone, Rec'r*, 2 N. Y., 235.)

William F. Shepard, for the respondents. This is not a case of double insurance, and does not call for an application of the *pro rata* clause. (*Ætna Fire Ins. Co.* v. *Tyler*, 16 Wend., 385, 396; *Columbian Ins. Co.* v. *Lynch*, 11 Johns., 233, 238; *Roberts* v. *Traders' Ins. Co.*, 17 Wend., 631; *Mut. Safety Ins. Co.* v. *Hone*, 2 N. Y., 235; *Howard Ins. Co.* v. *Scribner*, 5 Hill, 298.) If this is a case of additional or double insurance, the amount is to be ascertained by apportioning the whole insurance among the different parcels insured, in proportion to their value. (2 Phil. on Ins., 56, No. 1263, *a*; *Blake* v. *Exch. Mut. Ins. Co.*, 12 Gray; 78 Mass., 265; *Haley* v. *Dorchester Ins. Co.*, 1 Allen, 536–538.)

RAPALLO, J. The clause, now usual in policies of insurance, which provides for an apportionment of the loss in case of other insurance on the property, is a part of the contract, and must receive a reasonable construction. We have no right to engraft upon it the rules governing suits for contribution among insurers, nor to restrict its operation to cases where such suits could be maintained, but must look at the language of the clause itself and construe it as we would any other stipulation between the insurer and the insured.

We cannot adopt the view taken of this clause in the case of *Howard Ins. Co.* v. *Scribner* (5 Hill, 298), where it was held (in analogy to the rule in actions for contribution) that where a specific parcel of property is insured by one policy, and the same property is covered by another policy, which also includes other property, the latter policy is to be thrown wholly out of view, and does not constitute other insurance within the meaning of the clause. Neither can we agree to the doctrine contended for by the counsel for the appellant, that the whole sum insured by the more comprehensive policy is to be considered as so much additional insurance upon the parcel separately insured.

Where several parcels of property are insured together for an entire sum, it is impossible to say as to either of the parcels that there is no insurance upon it. Neither is it reasonable

to assume that any of the parcels is insured for more than its value where the whole sum insured is less than the aggregate value of all the parcels covered by the policy. The difficulty lies in determining what part of the whole sum insured is to be deemed applicable to either parcel where the policy itself makes no separation.

If the entire property is destroyed, as in this case, the rule laid down in 2 Phillips on Insurance (p. 56, No. 1263, *a*) and in *Blake* v. *Exch. Mut. Ins. Co.* (12 Gray, 265) carries out the intent of the clause and works entire equity between the insurers and the insured, as well as between the several insurers. That rule is, in substance, that for the purpose of apportioning the loss in case of over insurance, where several parcels are insured together by one policy for an entire sum, and one of the parcels is insured separately by another policy, the sum insured by the first mentioned policy is to be distributed among the several parcels in the proportion which the sum insured by that policy bears to the total value of all the parcels. Thus in round numbers the sum insured in this case by the *policies*, other than the defendant's, on the property, as an entirety, was $47,000. The total value of the property covered by these policies was $88,000. In case of a total loss, each parcel should be deemed insured thereby for $\frac{47}{88}$ of its value. The parcel separately insured by the defendant was worth $16,000, and was insured by the defendant for $3,000, which was equal to $\frac{3}{16}$ of its value. It is manifest that there was no over insurance, and that consequently there is no occasion for any apportionment.

Whether this would be the proper rule in case the $16,000 parcel alone had been destroyed or damaged, it is not now necessary to determine. In that event, if the defendant's policy had not existed, the whole loss would have been recoverable under the $47,000 insurance. It may be that the rule for ascertaining the amount of insurance upon any particular parcel where insurances are commingled, as in this case, is dependent upon the extent of the loss, and that whatever could be recovered upon the more comprehensive policy with-

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out regard to the other is the amount to be deemed insured thereby on the part injured in case of a partial loss, and that on that basis an over insurance to the extent of the separate policy might be established. By insuring several parcels of property for an entire sum the insured obtains the advantage, and the insurer subjects himself to the liability of having so much of the total sum insured as may be necessary to compensate for damage to any part of the property applied to that part, though the sum named in the policy would have been insufficient to cover the loss if the whole had been destroyed. Thus it is left to the result, in case of a partial loss, to determine what sum is insured upon any particular parcel, the only limit being its value. On the other hand, it would be desirable to adopt a general rule applicable to all contingencies. We refrain from expressing an opinion now upon the several phases which might be developed under an insurance of this character in case of partial loss, confining our adjudication to the case before us, which was that of a total loss of the whole subject insured by all the policies.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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WARREN HEIGHT, Plaintiff in Error, *v.* THE PEOPLE OF THE STATE OF NEW YORK, Defendants in Error.

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Where a general objection to proof offered is sustained, error will not lie if any true ground of objection exists. But if the proof is objectionable simply upon a ground which might be obviated, if specified, and such objection is not made, but is purposely suppressed, while others not tenable are stated, the former will be deemed to have been waived and cannot be urged to sustain the ruling upon appeal. (FOLGER and RAPALLO, JJ., dissenting.)

Defendants' counsel offered proof that two of the witnesses for the prosecution had made statements in conflict with their testimony upon a material point. This was objected to by the counsel for the prosecution "as improper, immaterial and hearsay." No objection was made that the attention of the witnesses had not been called to the conversation,

Opinion of the Court, per PECKHAM, J.

The evidence was excluded,—*Held*, error. (FOLGER and RAPALLO, JJ., dissenting.)

(Argued November 30, 1872; decided December 3, 1872.)

ERROR to the General Term of the Supreme Court in the third judicial department, to review a judgment of that court affirming a judgment of the Court of Sessions in and for the county of Saratoga, entered upon a conviction of plaintiff in error of the crime of assault with intent to commit a rape.

The facts pertaining to the question decided, sufficiently appear in the opinion.

J. P. Butler for the plaintiff in error. The offer of proof as to statements of Van Order and wife, made out of court and inconsistent with their testimony in court, was proper and material to impeach the witnesses, and should not have been excluded. (2 Brod. & Bing., 300; 6 English Common Law, 130; 2 Russell on Crimes, 930; 1 Am. Crim. Law, § 817.)

Samuel Hand for the defendants in error. The question to Amos Davis and the offer as to statements made by Mr. and Mrs. Van Order were properly excluded. (*Pendleton* v. *Empire Stone Dressing Co.*, 19 N. Y., 13; *Rockwell* v. *Brown*, 36 id., 210; *Lee* v. *Chadsey*, 3 Keyes, 225; *Carpenter* v. *Ward*, 30 N. Y., 243; *Plato* v. *Reynolds*, 27 id., 586; *Sanchez* v. *People*, 4 Parker, 556; *Wills & Conley* v. *People*, 3 id., 500; *Nation* v. *People*, 6 id., 258; *Holmes* v. *Anderson*, 18 Barb., 420; *Elton* v. *Larkins*, 5 Carr & Payne, 385; *Turnpike R. Co.* v. *Loomis*, 32 N. Y., 127; *Ward* v. *People*, 3 Hill, 395.) The objection by defendants' counsel to impeaching evidence offered by the people was properly overruled. (*Nolton* v. *Moses*, 3 Barb., 31, 32; *Green* v. *Brown*, 3 id., 120.)

PECKHAM, J. The questions sought to be raised by the prisoner's counsel are so inartificially presented in the bill of exceptions, that but very few can be reviewed.

The question, put to and answered by the prosecutrix, if "the fainting spell she had after she returned home was the result of" the occurrence she had stated of the alleged assault,

is one of the points not presented. The objection to the question was general, stating no grounds. How could the witness know the cause of the fainting fit? She might state the facts, but she could not give a medical opinion.

But the offer of proof by the witness, Davis, that Mr. and Mrs. Van Order stated to him that the abrasure on the side of Mrs. Howland, the prosecutrix, had the appearance of having been caused by her fingers, I think was improperly rejected. This proof was material, as it tended strongly to contradict the account given by them of the appearance of her side. They had both testified as to those injuries as they appeared the next morning after the alleged assault. They testified that "there were pieces taken out, and chunks taken out; the skin was off; there was five or six places." Mrs. Van Order afterward said she would swear there were more than six places. Mr. Van Order's testimony was to the same effect He said there "were gouges on the side, the same as though it was gouged right out;" were "some four or five places.

She testified that she never told Seymour Miller that it looked as if she had scratched it with her own fingers; and then that she never said so. Van Order said that he did not tell anything about the wound that he knew of. The testimony offered was objected to as "improper, immaterial and hearsay." There was no objection that the attention of the witnesses, Van Order and wife, had not been first called to this conversation; that no foundation had been laid for the contradiction. This was plainly, and, it would rather seem, purposely, evaded. The purpose of the evidence was very evident. If there could otherwise be any doubt, the preceding evidence showed the object. With a clear knowledge of the object, the counsel states every objection to the evidence except the true one. In such case, I think, he cannot avail himself of the true objection; especially in a case where, as here, if the true objection had been stated, it could easily have been obviated.

Groundless objections are more prejudicial to the objector's rights than none, as they tend to mislead.

It was a mere formal matter to recall the witness and put the question to her, if she had told *this witness* so. They had already stated they had never said so. This objection the people might waive. They as effectually waived it, by putting forward other objections and suppressing this, as if they had expressly waived it. The testimony offered, that the prisoner met and conversed with Brisbin the next day after the occurrence, in regard to it, was admissible simply to identify the time. The conversation itself was not required. But the objection was general, stating no grounds. In such case, where the decision is with the objector, the objection is sufficiently stated, and error does not lie for rejecting the evidence, as the opposite counsel has a right to have the objections stated. If he does not call for them he is not misled, and may be supposed to understand them. But where the grounds of objection are stated, and the true grounds are suppressed, he may be misled; and in a case like the one at bar, where the true ground, if stated, might have been obviated, that objection will be deemed waived. The counsel, the district attorney, in his points here, says this evidence was offered to contradict the prosecutrix, and then objects that no foundation had been laid for it; that she had not been first inquired of whether she had told the witness as offered to be proved. Thus it appears he understood the purpose of the evidence, and purposely suppressed the true objection to it.

This offered evidence, I think, was material.

The testimony of these witnesses, if true, showed wounds of a serious character; such as could scarcely have been inflicted by complainant's "own fingers." Her side was "gouged out;" "chunks of flesh" had been taken out in five or six places, according to their evidence. The offer was to show that "these abrasures had the appearance of having been caused by her own fingers." This would convey to the mind a very different impression of the character of the wound from that testified to by these witnesses, and of a

Statement of case.

character far less grave and much more trivial. It would, therefore, be material evidence.

The evidence, as presented against the prisoner, was not free from suspicion. In so slight a case this excluded evidence might have had decided influence.

How it was possible that those wounds could have been inflicted by the prisoner does not appear from the evidence in the case. It does not appear that his hands were upon her person, except on the outside of her clothes. No violence of his, as detailed by the complainant, could have caused them.

The judgment must be reversed, new trial granted, proceedings remitted to the sessions.

CHURCH, Ch. J., ANDREWS and ALLEN, JJ., concur.

FOLGER and RAPALLO, JJ., dissent. GROVER, J., not voting.

Judgment reversed.

50 396
138 479
50 396
143 436

JONATHAN L. BOOTH, Appellant, *v.* THE FARMERS' AND MECHANICS' NATIONAL BANK, Respondent.

A party who, after having assigned a judgment, satisfies it, is liable to the assignees for the amount of the judgment in case the satisfaction piece was given upon payment, and for the damages sustained if it was given without payment, and the assignee is prejudiced thereby.

This liability attaches to a corporation where a judgment in its favor is, after assignment, satisfied by its president, he being its financial officer.

The presumption arising from the giving of a satisfaction piece is that it was given upon payment of the judgment, and in the absence of proof to the contrary, it is sufficient to charge the party giving it with the receipt of the amount of the judgment.

A satisfaction piece of a judgment in favor of a corporation, which shows upon its face that it was executed by its president in his official capacity, is binding upon the corporation, although not executed in the name of or under the seal of the corporation.

(Argued November 25, 1872; decided December 3, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order denying motion for a new trial, and directing judgment

in favor of defendant upon a nonsuit. (Reported below, 4 Lans., 301.)

This action was brought to recover the amount of a judgment in favor of defendant and assigned by it to plaintiff, and afterward, as alleged, satisfied by defendant.

On the 29th December, 1860, defendant recovered a judgment in the Supreme Court against Archibald H. McLean, Hector McLean, and Theodore Goddard, impleaded with Charles L. Flint, for $3,503.21. On the 14th December, 1861, it assigned the judgment to plaintiff. On the 11th April, 1864, Jacob Gould, who was the president and financial officer of defendant, executed a satisfaction of the judgment, of which the following is a copy:

"SUPREME COURT.

"THE FARMERS' AND MECHANICS' BANK OF ROCHESTER *against* ARCHIBALD H. McLEAN, HECTOR McLEAN, THEODORE GODDARD AND CHARLES L. FLINT.	*Judgment docketed 29th Dec.*, 1860.

"STATE OF NEW YORK, *Monroe County.* } *ss.:*

"I, Jacob Gould, president of said bank, acknowledge satisfaction of a judgment recovered against Charles L. Flint and others in the Supreme Court of the State of New York, between the Farmers' and Mechanics' Bank of Rochester, plaintiff, and Archibald H. McLean, Hector McLean, Theodore Goddard and Charles L. Flint, defendants, for $3,503.21 damages and costs.

"Judgment record filed and docketed the 29th day of December, one thousand eight hundred and sixty, in the county of Monroe.

"Dated the 11th day of April, 1864.

"J. GOULD,
"*President.*"

Statement of case.

"Subscribed and acknowledged before me, this 11th day of April, in the year 1864, by Jacob Gould, president, etc., personally known to me.

"W. R. SEWARD,
"*Notary Public.*"

This was filed upon the same day, and the usual entry of satisfaction made upon the docket of the judgment. On the trial of action the plaintiff offered to prove that on and prior to the 11th of April, 1864, the defendants in the assigned judgment, McLeans and Goddard, were the owners in fee of real estate subject to the lien of said judgment, and that after the discharge of such judgment the said real estate was sold and conveyed to a *bona fide* purchaser. This evidence was rejected, and the plaintiff excepted.

The court nonsuited the plaintiff, upon the grounds "that there was no evidence to show that the bank had ever received any money upon the discharge of said judgment, and that the said bank having assigned such judgment to the plaintiff, the said Gould had no right or authority to discharge such judgment after such assignment, and that the said bank was not affected by his action in that behalf."

W. F. Cogswell for the appellant. The satisfaction of the judgment by the president of the bank was *prima facie* evidence of the receipt by the bank of the amount of the judgment. (*Bridenbecker* v. *Lowell*, 32 Barb., 9–17; *Miner* v. *Mechanics' Bk. of Alexandria*, 1 Peters, 46–70; *Sterling* v. *Marietta and Susquehanna Trading Co.*, 11 Serg. & Rawle, 179; *State Bank* v. *King*, 1 Brees. Ill., 45; *Concord* v. *Concord Bank*, 16 N. H. [2d series], 26.) The satisfaction piece was the acknowledgment of the bank. (*Watervliet Bank* v. *White*, 1 Den., 608–613; *Folger* v. *Chase*, 18 Pick., 63, 67; *Bank of Genesee* v. *Patchin Bank*, 13 N. Y., 309; S. C., 19 id., 312, and cases cited; *Farmers' and Mechanics' Bank of Kent* v. *The Butchers' and Drovers' Bank*, 16 id., 125.) The filing and recording of the satisfac-

tion discharged the judgment. (2 R. S., 360, § 12; 362, § 22, 1st ed., 373, 375; Edm. ed. Laws of 1840, 334, § 25; 335, § 34; Laws of 1847, 334–338, §§ 52, 65; Code, § 282.) The bank was bound by the discharge of the judgment by the president. (*American Ins. Co.* v. *Oakley*, 9 Penn., 496; *Mumfor* v. *Hawkins*, 5 Den., 355; *Farmers' and Mechanics' Bank* v. *Butchers' and Drovers' Bank*, 16 N. Y., 125; *N. Y. and N. H. R. R. Co.* v. *Schuyler et al.*, 34 id., 30; *Fogg* v. *Griffin*, 2 Allen, 1; *Sanford* v. *Handy*, 23 Wend., 260; *Johnson* v. *S. W. R. R. Bank*, 3 Story Eq., 263, 317; Story on Agency, § 452, *et passim*.)

Theodore Bacon for the respondent. After the assignment of the judgment the president of the bank had no right to satisfy, and the bank was not affected by his action in its behalf. (*Bank of U. S.* v. *Dunn*, 6 Peters, 51; *U. S.* v. *City Bank of Columbus*, 21 How. U. S., 356; *Kirk* v. *Bell*, 12 Eng. Law & Eq., 385; *Hoyt* v. *Thompson*, 1 Seld., 334–335; *Holt* v. *Bacon*, 25 Miss., 567; *Beers* v. *Hendrickson*, 45 N. Y., 665; *Wyman* v. *Hallowell and Augusta Bank*, 14 Mass., 58, 61, 62; *Salem Bank* v. *Gloucester Bank*, 17 id., 28, 30; *Foster* v. *The Essex Bank*, id., 479, 508–510; *Olney* v. *Chadsey*, 7 R. I., 224.) The satisfaction not having been entered on the record, there was no discharge of the judgment. (*Lownds* v. *Remsen*, 7 Wend., 35.)

RAPALLO, J. A party who, after having for a valuable consideration assigned a judgment, satisfies it, clearly incurs a liability to his assignee. If the satisfaction piece is given on payment of the judgment, the money may be recovered by the assignee in an action for money had and received, and if the satisfaction is given without payment, and the assignee is prejudiced thereby, he is entitled to recover of his assignor the damages sustained. In the absence of proof to the contrary, the presumption arising from the giving of a satisfaction piece is that it was given upon payment of the judgment. The satisfaction piece is an acknowledgment of the satisfaction of

the judgment. This is equivalent to an acknowledgment of its payment, which is the proper and usual way of satisfying it and is sufficient *prima facie* as an admission to charge the party giving it with the receipt of the amount.

If the defendant in this case were a natural person, and had personally executed the satisfaction piece, it can hardly be controverted that the evidence would be sufficient *prima facie* to charge him with having received the amount of the judgment. But being a corporation, and the satisfaction piece having been executed by its president, it is claimed and was held in the court below that the defendant is not liable.

It was admitted upon the trial that the president was the financial officer of the defendant. The judgment had been recovered by the defendant against the makers of a promissory note. Clearly, under ordinary circumstances, the president was empowered to receive payment of this note, or of the judgments recovered upon it, and this power necessarily included authority to give such acquittances and discharges as the debtors were entitled to receive on making payment. The giving of a satisfaction piece was therefore within the scope of the official authority of the president, and *prima facie* evidence of the receipt by the bank of the amount due on the judgment.

It is claimed, however, that the authority of the president, and the bank itself, to collect and satisfy the judgment ceased when the bank assigned it to a third party, and that therefore the bank is not bound by what the president did after such assignment.

This court has in several cases decided adversely to the doctrine which lies at the foundation of this position. When an officer does an act which is within the general scope of his powers, although circumstances may exist which render the particular act a violation of his duty, the corporation is nevertheless bound by his act as to persons dealing in ignorance of those circumstances, and is reponsible to innocent third parties who have sustained damages occasioned by such act. And the liability of the corporation for the consequences of acts of

its officers done within the scope of their general powers is not affected by the fact that the act which the officer has assumed to do is one which the corporation itself could not rightfully do. A corporation may do wrong through its agents as well as a private individual. (*N. Y. & N. H. R. R.* v. *Schuyler*, 34 N. Y., 30; *Farmers' & Mech. Bank* v. *Butchers' & Drovers' Bank*, 16 id., 125; *Bissell* v. *Mich. South. R. R.*, 22 id., 258; *Bank of Genesee* v. *Patchin Bank*, 13 id., 309, and S. C., 19 id., 312.)

The filing of the satisfaction piece and its entry on the docket were effectual to discharge the lien of the judgment upon the real estate of the debtors, at least as to *bona fide* purchasers. (2 R. S., 360, § 12, 362, § 22; *Taylor* v. *Ranney*, 4 Hill, 619; Laws, 1820, p. 334, §§ 25, 34, 335; Laws, 1847, p. 334, §§ 52, 65, 338; Code, § 282.)

It also discharged the debtors themselves if they paid the judgment in ignorance of the assignment. It clearly caused damage to the plaintiff, and was a violation of the obligation of the bank resulting from the assignment, even if it should appear that the money was not paid.

It is objected that the satisfaction piece was not executed in the name of the bank or under its seal. It sufficiently appears, however, upon the face of the instrument that it was executed by the president in his official capacity and in the business of the bank, and on its behalf. It is not capable of any other construction. This made it as binding upon the bank as if its name had been formally prefixed to the signature of its president. (1 Den., 613; 19 N. Y., 312; 16 id., 125.)

We think also that it sufficiently identifies and describes the judgment. It is inaccurate in stating that the judgment was between the Farmers' and Mechanics' Bank of Rochester, plaintiff, and the McLeans, Goddard and Flint, defendants, instead of stating that it was against the McLeans and Goddard impleaded with Flint, and also stating in another place that it was against Flint and others. But we do not think that this inaccuracy deprived it of validity, as the names of

the defendants against whom the judgment was recovered, and the date and amount are correctly set forth, and it was proved that there was no other judgment to which any part of the description could apply.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

All concur except CHURCH, Ch. J., not voting.

Judgment reversed.

50	402
114	418
114	422
50	402
130	543
50	402
142	389
50	402
151	91
50	402
d162	293
j162	298
j162	300
j162	302
f162	555
50	402
f164	329

WILLIAM D. ELLIS, Respondent, *v.* THE ALBANY CITY FIRE INSURANCE COMPANY, Appellant.

An unrestricted authority to an agent of a fire insurance company to negotiate a contract of insurance by issuing a policy, includes authority to make a valid preliminary contract for such issue; and a parol agreement to that effect upon his part, and the receipt of the premium therefor binds the company.

One McC. was agent for several insurance companies, including defendant. Plaintiff applied for insurance upon a quantity of cotton; the amount to be insured and the premium was agreed upon, and McC. agreed to insure as requested. Plaintiff left it to McC. to determine in what companies he would place the insurance and the amount in each. He decided to place $6,100 with defendant and entered the contract to that effect in his register, received the premium and credited amount to defendant, and before loss reported and paid over to defendant. *Held*, that this was, in substance, a contract to issue a policy for the amount so placed, and was binding upon defendant. (RAPALLO, ALLEN and ANDREWS, JJ., dissenting.)

(Argued November 11, 1872; decided November 26, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order denying motion for a new trial and directing judgment in favor of plaintiff upon verdict. (Reported below, 4 Lans., 433.)

This action was brought upon an alleged contract of fire insurance upon a quantity of cotton at Appalachicola, Florida.

In November, 1865, C. F. McCoy was appointed agent of

Statement of case.

the defendant at Augusta, Georgia, under a power of attorney which described the extent of his agency as follows: "As agent he is authorized and empowered to receive proposals for insurance against loss or damage by fire, and to make insurance by policies of the said Albany City Fire Insurance Company, to be countersigned by the said C. F. McCoy, and to renew the same; to assent to assignments and transfers, and to do all lawful acts and business pertaining to said agency which may, from time to time, be given him in charge by said company."

McCoy was also agent for several other insurance companies. McCoy received from defendant a quantity of blank policies signed by its president and secretary.

In January, 1866, he agreed to insure for plaintiff a quantity of cotton by steamer to and at Appalachicola for $26,000; no companies were designated. McCoy placed $6,100 of the amount with defendant, and made an entry upon his register.

No. of policy.	Name of assured.	Term.
62. 21,817.	W. D. Ellis.	1 month.

Commencement of risk.	Expiration of risk.
January 15, 1866.	February 15, 1866.

Copy of policy.	Amount insured.
On cotton at Appalachicola.	$6,100.

	Premium.
Rate ¼.	$45 75.

The premium was paid. It was forwarded to defendant with other premiums in the fore part of February and receipt acknowledged. The property was damaged by fire February 15, 1866, at 7 A. M. No policy was issued until after the fire, when a policy was made out and delivered to plaintiff. Further facts appear in the opinion.

At the close of the trial the court directed a verdict for plaintiff, exceptions to be heard at first instance at General Term.

Statement of case.

Amasa J. Parker for the appellant. Where the agent of an insurance company, acting under a written limited authority, exceeds that authority, the act is unauthorized and void. (*Stringham* v. *St. Nicholas Ins. Co.*, 37 How., 365; S. C., 3 Keyes, 280; *Bentley* v. *Columbia Ins. Co.*, 17 N. Y., 421; *Wall* v. *Home Ins. Co.*, 8 Bosw., 597; *Chase* v. *Hamilton Ins. Co.*, 22 Barb., 527; 1 Wait Law and Prac., 216; *Wilson* v. *Genesee Mutual Ins. Co.*, 14 N. Y., 418; *Andrews* v. *Kneeland*, 6 Cowen, 354; 2 Grant's Cases, 470; 2 Kent's Com., 620, marg.) The unauthorized act of McCoy was never ratified by the defendant. (*Seymour* v. *Wyckoff*, 6 Seld., 213; *Nixon* v. *Palmer*, 4 id., 398; S. C., 4 id., 401.)

Samuel Hand for the respondent. It was not necessary that a written policy should be executed. Every requisite for a valid contract was satisfied. (*Kelly* v. *Commonwealth Ins. Co.*, 10 Bosw., 82; 19 How. [U. S.], 318; 43 Barb., 356, 364; *Pratt* v. *Hudson River Railroad*, 21 N. Y., 314; 43 Barb., 364; 21 id., 314; *Trustees of First Baptist Church* v. *Brooklyn Fire Ins. Co.*, 19 id., 305; *Commercial Mutual Insurance Company* v. *Union Mutual Insurance Company*, 19 How. [U. S.], 318; *Bunten* v. *Orient Mutual Insurance Co.*, 8 Bosw., 446; *Audubon* v. *Excelsior Ins. Co.*, 27 N. Y., 216; *Post* v. *Ætna Ins. Co.*, 43 Barb., 351; *Chase* v. *Hamilton Ins. Co.*, 22 id., 527, reversed in Court of Appeals, but on another point.) The making of this contract was within the power of McCoy the agent. (*Sanborn* v. *Fireman's Ins. Co.*, 16 Gray, 448; *Kelly* v. *Commonwealth Ins. Co.*, 10 Bosw., 82; *Baptist Church* v. *Ins. Co.*, *supra*; S. C., 28 N. Y., 153; *Bunten* v. *Orient Ins. Co.*, *supra*; Dunlap's Paley on Agency, 189.) McCoy's possession of the policies was an indication on which plaintiff had a right to rely that he was a general agent. (*Devendorf* v. *Beardsly*, 23 Barb., 656; *Lightbody* v. *N. Am. Ins. Co.*, 23 Wend., 22; *Post* v. *Ætna Ins. Co.*, 43 Barb., 351, 361, 372; *Wood* v. *Poughkeepsie Ins. Co.*, 32 N. Y., 619; *Sheldon* v. *Atlantic Ins. Co.*, 26 id., 46; *Perkins* v. *Washington Ins. Co.*, 4 Cowen, 645; *Lightbody*

v. *N. Am. Ins. Co., supra; Post* v. *Ætna Ins. Co.*, id., *Devendorf* v. *Beardsley*, id.; *Boehen* v. *Ins. Co.*, 35 N. Y., 131; *Woodbury* v. *Charter Oak Ins. Co.*, 31 Conn., 517.) The contract of insurance was ratified by the defendant. (*Whitaker* v. *Farmers' Union Ins. Co.*, 29 Barb., 312; *Peele* v. *Ins. Co.*, 3 Mason, 22.) The preliminary proofs were sufficient. (4 Bosw., 1; 43 Barb., 351; 31 How. Pr., 508; 1 Abb. [N. S.], 349.) The loss and the amount of damage were sufficiently proved, and the verdict was less than the evidence would have warranted. (*Wicklow* v. *Lane*, 37 Barb., 244; *Dowd* v. *Rush*, 28 id., 157; *Grazer* v. *Stillwagen*, 25 N. Y., 316; *Winchell* v. *Hicks*, 18 id., 558, 565; *Taylor* v. *Atlantic Mut. Ins. Co.*, 37 id., 275, 283.)

GROVER, J. Whatever doubts may formerly have been entertained as to the validity of parol contracts of insurance, made by insurance corporations, authorized by their charters to make insurance by issuing policies, it is now settled that they are valid. (*Commercial Marine Insurance Company* v. *The Union Insurance Company*, 19 How., U. S., 321; *Trustees, etc.*, v. *Brooklyn Fire Insurance Company*, 19 N. Y., 305.) It is equally well settled that parol contracts of such companies, to effect an insurance by issuing policies, are valid, and will be enforced by compelling specific performance by the company, or in an action for the breach of the agreement; in either of which a recovery for a loss of the property agreed to be insured will be awarded to the plaintiff. The inquiry in this case is whether an agreement to issue a fire policy upon the cotton, for the loss of which this action was brought, was made by the defendant. It was proved that C. F. McCoy, a resident of Augusta, Georgia, in 1865 was engaged in the insurance business as agent for several insurance companies, incorporated by different States; that in November of that year the defendant appointed him its agent, giving him a power of attorney, the material part of which in this case was as follows: "Be it known that C. F. McCoy, of Augusta, State of Georgia, is hereby duly appointed

and constituted an agent of the Albany City Fire Insurance Company, at Augusta, during the pleasure of said company. As agent, he is authorized and empowered to receive proposals for insurance against loss or damage by fire, and to make insurance by policies of the said Albany City Fire Insurance Company, to be countersigned by the said C. F. McCoy, and to renew the same, to assent to assignments and transfers." That at the same time the defendant delivered to McCoy a quantity of blank policies of insurance, signed by its president and secretary. The question in this case is whether this authorized McCoy to make a contract binding upon the defendant for the issue of a policy of insurance. In determining this question the prevailing usage in transacting such business must be regarded; as it is an elementary principle that the delegation of an authority to transact any business includes an authority to transact it in the usual way, and to do the acts usual in its accomplishment. It must also be kept in mind that he was clothed with full authority to make all necessary surveys to determine the risk, its duration and the rate of premium, without any reference to a consultation with the company or any of its officers; in short, to negotiate and conclude all the terms of the contract, and to consummate it by filling up and countersigning the policy. This necessarily includes power to make a preliminary contract for the issuing of a policy; as it is manifest that no policy could ever be issued in the absence of such a contract. The question is whether this preliminary contract is binding upon the company. In other words, whether, when made, and the premium therefor paid by the assured, the company is bound, before the policy is actually filled up, countersigned and delivered. It is clear that if binding upon the company at all for the shortest period of time, it will so continue until, by some act of the assured or in some other way, it is discharged therefrom; mere lapse of time, short of the running of the statute of limitations, will not have this effect. The usage of making agreements for insurance and paying the premiums, providing for the issuing of policies thereafter, to

be dated at and in force from the time of making the agreement, is so general that judicial notice must be taken of it. It would, upon principle, follow that an unrestricted authority to negotiate a contract of insurance by issuing a policy, included authority to make a valid preliminary contract for such issue. In *Post* v. *Ætna Insurance Company* (43 Barb., 361) it was shown that the agent was intrusted with blank policies and certificates of renewal, executed by the officers of the company, which provided that they should not be operative until countersigned by the agent. The agent was shown to have transacted business for some time for the defendant. It was held that the possession and use of these papers by the agent showed that he was authorized to make a preliminary agreement for the renewal of a policy by issuing a certificate, although a parol agreement, renewing the same, would be unauthorized. This is a direct authority for the power of the agent in the present case to make a like agreement for the issuing of a policy. The possession of blank policies and certificates of renewal by an agent, providing that they shall be effective only when countersigned by such agent, imports nothing more than what is expressed in the power of attorney in the present case; that is, an authority to bind the company by filling up, countersigning and delivering the policy or certificate; and so it was regarded by the court, as the validity of the contract was placed upon the ground that it was necessary that such agreement should precede the issuing of the paper, and that the company was responsible for the failure of the agent to perform what he had undertaken to do by such agreement. In *Sanborn* v. *Fireman's Insurance Company* (16 Gray, 448) this question was considered. The court remarked: "The objection that the agent had only power to issue policies, and not otherwise to make contracts binding on the defendant, comes within the same rule of construction. His power of attorney authorized him to effect insurance, and, for this purpose, to survey risks, fix the rate of premium and issue policies of insurance, signed by the president, etc. We are of opinion that this gave him authority to make the

preliminary contract as well as to issue the policy. He was not a special agent employed merely to receive and transmit proposals to his principal, but had power to do whatever the company could do in effecting insurance; and it appeared by the evidence of the defendant that he was furnished with policies signed in blank, to be filled up and issued at his discretion. It will be seen that the court declared the authority to make the preliminary contract from the full power given to negotiate the contract, and fill up and issue the policy in his discretion, and not from a construction giving the agent power to bind the company by parol contracts of insurance. In this view, the case sustains the position contended for by the plaintiff in the present case. It is not claimed that McCoy could bind the defendant by a parol contract of insurance. That is not the question; but it is whether, having agreed upon the terms of an insurance and to issue a policy therefor, the company is liable for his failure to perform such contract. My conclusion is that it is. It may be said that this construction would enable McCoy to perpetrate a fraud upon the company by making preliminary contracts when its design was only to become bound by writing. This, to a certain extent, may be true; but it furnishes no reason for depriving third persons of the benefit of contracts entered into with him as its agent, who relied thereon for indemnity from a loss from the peril embraced in the contract, by a construction of the papers more strict and rigid than is fairly required by their import. It is an elementary rule that the principal must bear a loss sustained by the misconduct of his agent, acting within the scope of his authority, rather than a third person who has fairly dealt with him as such. Assuming that McCoy was authorized to bind the defendant by a contract to issue a policy, the defendant insists that no such contract was in fact made. The undisputed evidence showed that, in the fall of 1865, McCoy was the agent of several insurance companies; that the plaintiff had about 112 bales of cotton at Howard's landing, upon the Chattahoochee river; that he applied to McCoy for insurance upon this cotton

while there, and for further insurance while on its transit from that place to Appalachicola, and, also, for insurance upon the same after its arrival at the latter place until placed on shipboard for Liverpool; that the amount to be insured was agreed upon, and the premium determined by McCoy, who agreed to insure the same as requested; that the plaintiff left it to McCoy to determine in what companies he would place the insurance, and the amount in each respectively; that McCoy, among other companies, determined to place $6,100 of the amount to be insured in the defendant's company, and entered the contract to that effect in the register kept by him, received the premium thereon, and credited the amount to the defendant; and, before any loss accrued, reported the risk taken, and paid the premium to the defendant. This was a contract by McCoy to insure the above amount in the defendant's company; and as he could only effect this by issuing a policy, a contract (as was held in *Post* v. *The Ætna Company*, *supra*) to issue such policy. This contract being valid against the defendant, it follows that all exceptions taken to rulings of the judge, as to the competency of evidence given for the purpose of showing a subsequent ratification, are unavailable.

The remaining question arises upon the exception taken to the direction of the judge as to the amount of the verdict directed for the plaintiff. This was that contained in the proofs of loss. This was not competent evidence against the defendant upon that point; nor was the report of the loss made to the company by McCoy competent as to this against either party. But the evidence showed the number of bales (112), the weight of each bale; the lowest price per pound fixed by any witness speaking upon that subject was thirty-seven cents. The witness Preston gives the only testimony showing the extent of the loss. He says that some four or five hundred bales were damaged or consumed by the fire; that the plaintiff was the consignor of 112 bales, giving marks; that he did not know the relative quantities damaged or consumed; that the

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112 bales of the plaintiff were damaged or consumed. Other evidence was given showing the value of the damaged cotton, which, deducted from the value of the 112 bales, and apportioning the loss between the insurers according to their respective amounts, would have entitled the plaintiff to recover against the defendant a sum larger than that stated in the proofs of loss. The defendant was not, therefore, injured by the judge's adopting that sum, as there was no evidence that would have justified a verdict for a less amount.

The judgment appealed from must be affirmed, with costs.

CHURCH, Ch. J., PECKHAM and FOLGER, JJ., concur.

RAPALLO, ALLEN and ANDREWS, JJ., dissent.

Judgment affirmed.

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CAROLINE DOUBLEDAY, Appellant, *v.* ISAAC KRESS, Respondent.

The possession by an assumed agent of a promissory note payable to the order of the payee, and not indorsed by him, is not alone sufficient evidence of his authority to authorize a payment thereof to him.

The payee of such a note delivered it to an agent with authority to receive the interest thereon, and to take a new note with an indorser. The maker paid principal and interest to the agent. In an action by the payee upon the note,—*Held* (CHURCH, Ch. J. and GROVER, J., dissenting), that the agent was not authorized to receive payment of the principal in money and that plaintiff was entitled to recover

(Argued November 18, 1872; decided December 3, 1872.)

APPEAL from order of General Term of the Supreme Court in the fourth judicial department, reversing a judgment in favor of plaintiff entered upon a verdict and reversing an order of Special Term denying a motion for a new trial.

This action was brought to recover the amount of a promissory note for $800, made by defendant, dated April 11, 1867, payable to the order of plaintiff, one year from date, "at L. J. Wilkin's land office in Dundee." About the time the note fell due she was told by her son-in-law, Theodore Miller, that

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defendant wished to pay interest and renew the note for one year; she thereupon gave him the note, with instructions to get a new note for the principal indorsed by one Raplee. Defendant before the note fell due left the money to pay it with Mr. Wilkin at his office (the place of payment specified in the note). Murray presented the note when due, with a forged order attached, reading thus: "Mr. Wilkin, please pay my money to Mr. Murray, Caroline Doubleday." Upon receipt of the note and order, Wilkin, in the presence of defendant, paid the money over to Murray. The latter paid over the interest to plaintiff and absconded with the principal. Some further facts appear in the opinion. The court directed a verdict for the plaintiff, which was rendered accordingly.

H. Humphrey for the appellant. Plaintiff's verbal directions in regard to the note to Murray could not affect Kress or Wilkin, who knew nothing of them. (*Johson* v. *Windler*, 3 Bing. N. C., 125; *Cheap* v. *Hanly*, 3 T. R., 127; Chitty on Bills, 261, and *Assignees of Bagnall and Hand* v. *Sheppard*, London Sittings after Hilary Term, 16 Geo. III, there cited; *Smith* v. *Chester*, 1 T. R., 654; *Allen* v. *Dundas*, 3 id., 127; *Mead* v. *Young*, 1 id., 28; Camp. Rep., 28; *Foster* v. *Clements*, 2 id., 17; *Hall* v. *Fuller*, 5 B. & C., 750; *Smith* v. *Mercer*, 6 Taunton, 74; 1 Marsh, 453; 2 Parsons on Notes & Bills, 211, and cases cited; *Weisser* v. *Dennison*, 6 Seld., 68; Story on Agency, 98; *Morgan* v. *Bank of State of New York*, 1 Kern., 404; *Holbsinger* v. *Nat'l Bank of Albany*, 37 How. P. R., 203; *Canal Bank* v. *Bank of Albany*, 1 Hill, 287.) Murray had no authority to present the note. (Chitty on Bills, 391, and cases cited there, in note M; id., 394, note A; *Owen* v. *Barrows*, New Rep., 103, 2 Ld., 930; *Johnson* v. *Windler*, 3 Bing., N. C., 125.)

Charles S. Baker for the respondent. The note could be transferred by the appellant by mere delivery, without indorsement, so that the transferree could recover thereon. (*Franklin Bank* v. *Raymond*, 3 Wend., 69; *Savage* v.

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Brown, 12 How., Pr. R., 166; *Hastings* v. *McKivly*, 1 E. D. Smith, 273; Story on Agency, §§ 94, 98.) When the agent has the possession of the security the payment is good of the principal although the agent is only authorized to collect the interest. (*Megary* v. *Funtis*, 5 Sanf. Sup. Ct. R., 376; Opin. SANFORD, J., 379, 380; *Williams* v. *Walker*, 2 Sanf. Ch. R., 325; Greenl. Ev., vol. 2, § 65; *Hatfield* v. *Reynolds*, 34 Barb. S. C., 612; *Tappen* v. *Minman*, 18 Iowa, 499; *Foster* v. *Beals*, 21 N. Y., 247; Story on Agency, § 56; *Barber* v. *Briton*, 26 Vt., 112; *Rawls* v. *Deshler*, 3 Keyes, 572.) Appellant is liable for any loss occasioned by the misconduct of the agent. (*Cartwright* v. *Wilmerding*, 24 N. Y. R.; Opin. GOULD, J., 529; *Bassett* v. *Spofford*, 2 Daly, 435.) Murray was a general agent in law. (*Bridenbecker* v. *Lowell*, 32 Barb., 18; *Johnson* v. *Jones*, 4 id., 369; 1 Parsons on Contracts, 39, 40; *Dunning* v. *Roberts*, 35 Barb., 463, 467; *Barbour* v. *Briton*, 26 Vt., 112.) Appellant has been guilty of laches, or, at least, ratified the payment. (*Johnson* v. *Jones*, 4 Barb. S. C., 369; Opin., ALLEN, J., 373; *Hanks* v. *Drake*, 49 Barb. S. C., 186; *Bridenbecker* v. *Lowell*, 32 id., 10; 1 Parsons on Contracts, 51, cases cited; *Benedict* v. *Smith*, 6 Paige, 126; Opin. clause 130; Story on Agency, § 250.) Appellant allowed Murray to assume the apparent position of her agent, and the right to receive payment of the note; she cannot now gainsay his right to do so to respondent's prejudice. (*Johnson* v *Jones*, 4 Barb., 373; *Bridenbecker* v. *Lowell*, 32 id., 16, 17; *Dunning* v. *Roberts*, 35 id., 467; *Lefler* v. *Field*, 50 id., 411; *Booth* v. *Bince*, 40 id., 117, 118; *Whitbeck* v. *Schuyler*, 44 id., 471; *Caimes* v. *Bleecker*, 12 Johns., 300; *Culver* v. *Ashley*, 19 Pick., 300; *Hanks* v. *Drake*, 49 Barb. 201, 202.)

PECKHAM, J. The question is, had Murray, the son-in-law of plaintiff, who received the money on the note in suit, principal and interest, authority to do so, actual or apparent? If he had actual authority, of course that ends this suit, as the

note sued on is paid. If he had apparent authority from the plaintiff, the result is the same.

Had he apparent authority? Mere possession of the note by the assumed agent, Murray, unindorsed, without any other sustaining facts, is not sufficient to authorize payment to him.

This is well settled by authority. (Story on Agency, § 98, and cases there cited.) In *Williams* v. *Walker* (2 Sand. Ch. R., 225), this subject is discussed, and many of the authorities reviewed, chiefly as to mortgages and bonds. *Brown* v. *Blydenburgh* (3 Seld., 141) and *Foster* v. *Beals* (21 N. Y., 247) do not touch this case. They relate to payments made by mortgagor to mortgagee, after assignment of the mortgage, without notice thereof and without the production of the mortgage. There must be some additional fact to give validity to such a payment. That the agent took the security, or negotiated and made the loan for which the security was taken, and was thereafter intrusted by the owner with its possession, is sufficient to render the payment valid. No fact of that kind appears in this case. True, it is stated in the stipulation signed by the plaintiff's attorneys that Murray, plaintiff's son-in-law, acted as agent of the plaintiff in loaning the money, the consideration of the note. Though the form of the stipulation admits its statements as facts upon the trial, it is apparent that it was not so understood by the parties; as the plaintiff proved, without objection, that Murray had nothing to do with the loan to the defendant or with the taking of the note. This evidence was clear and uncontradicted, and left Murray with no additional support to the mere fact of his possession of the note Had any objection been made to this evidence, the court had power and doubtless would, upon a proper application, have relieved the plaintiff from the effect of her attorney's stipulation.

The reason of the rule, that one who has made the loan as agent and taken the security is authorized to receive payment when he retains possession of the security, is founded upon human experience, that the payer knows that the agent

has been trusted by the payee about the same business, and he is thus given a credit with the payer.

In the case at bar the payer had been furnished with no such credit by the assumed agent. Furthermore, he was not deceived by the mere production of the note. All parties to the transaction there acted upon the assumption that the mere production of the note, payable to plaintiff's order and not indorsed, showed no authority to receive the payment. Hence Murray, the assumed agent, forged the order to pay, and upon inquiry by the defendant's lawyer as to the genuineness of that order and receiving a satisfactory answer, the payment was made; the defendant being enjoined by his lawyer to paste the order to the note, virtually to preserve the evidence of the agent's authority.

Hence the action of both parties accorded with the law. Neither was deceived by the mere production of the indorsed note into the belief that that alone gave authority to receive payment. The note was not indorsed, and hence the agent could not, unless otherwise authorized, transfer it or receive the money. (Chitty on Bills, 228.)

Had the agent actual authority to receive entire payment, it is not material to deny that he was thereby authorized to do all things necessary to effectuate the payment. But having a right to receive only the interest, he had no more right to draw an order for the principal, than if he had no power to receive anything.

If, then, the apparent power, if all the real facts that the defendant knew or with which he was furnished, gave the agent no power to receive payment, we must resort to his actual power. When we go there, we must take the whole authority together, and cannot take such part as will sustain the payment, suppressing that which destroys it.

This is a familiar rule that needs no authority. The law implies a knowledge of one part of the actual authority as much as of another, if it implies either. Taking the whole together, it is plain that Murray had no power to receive anything but the interest. This does not infringe upon the rule, that a payee

who has given his agent credit with the payer by employing the agent in obtaining the obligation, and then by allowing him to retain its possession, clothes him with apparent authority to receive the payments of interest and principal according to the tenor of the instrument.

The payee cannot, then, contradict that apparent authority unless he brings a knowledge of it home to the payer. Nor can the agent receive pay otherwise than according to the terms of the obligation.

If the debtor pay before due the principal, the payee is not bound. (Story's Agency, § 98; 2 Pars. on Notes, 214, and cases cited; *Paruthen* v. *Gaitskell*, 13 East., 432; 1 Stark., 185.) Nor does it infringe the rule that an agent who made the loan, having possession of the security and clothed with apparent authority to receive the interest, is authorized also to receive the principal when it falls due.

In the case at bar the agent had the same apparent authority to receive the principal that he had to receive the interest, and no more. He had no apparent authority to receive either.

His actual authority was to receive the interest and take a new note at a year, with Raplee as indorser. This alone was his actual authority. Under that authority the defendant had no more right to pay him the money, the principal, than an agent to collect a note would have authority to receive payment in goods, or in a note at a year. Such an agent can only receive the payment in money according to the tenor of the note, which is payable in money. (Chitty on Bills, 399; Story on Agency, § 98, and cases there cited.)

With a knowledge of Murray's actual authority, defendant knew he could not pay him the principal. If he did, it would be at his peril if Murray failed to pay it over. Plaintiff might have been willing, as she was, to trust Murray to receive another note, with a named indorser, when she would not trust him to receive all the money. The responsibility, the temptation is different.

Defendant might have refused to pay or give a note, but if

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he did anything, he must do precisely what Murray was authorized to receive. To say otherwise, is to say that the plaintiff could not give her agent any special authority in the matter, and if she did, the defendant, with full knowledge thereof, might safely disregard it in dealing with the agent.

The facts as presented come very near to larceny of the note by Murray. It is clear that he obtained its possession with the felonious intent of converting its proceeds, except the interest, to his own use, and he did so. He was guilty of forgery in making the order.

Both parties have been grossly imposed upon. It is a very hard case for the defendant, but I think, under the facts, the law places the loss, caused in fact by this forgery, upon him who was deceived by it. The defendant alone was imposed upon by that. The effect of it is the same as if an indorsee had discounted a note upon a forged indorsement.

The order of the General Term should be reversed, and the judgment and order of the Special Term affirmed.

All concur, except CHURCH, Ch. J., and GROVER, J., who dissent upon the ground that the authority to receive all money for the note was within the power given him to receive payment of the interest in money, and of the principal by another note.

Judgment accordingly.

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JOHN GAFFNEY, Plaintiff in Error, *v.* THE PEOPLE OF THE STATE OF NEW YORK, Defendants in Error.

Upon the trial of an indictment before the Superior Court of the city of Buffalo, in case the regular panel of jurors is exhausted, and it becomes necessary to summon talesmen, the court is not limited to the method prescribed by the twenty-ninth section of the act creating said court (§ 29, chap. 96, Laws of 1854, as amended by chap. 754, Laws of 1857), but it has power to order talesmen to be summoned in pursuance of the provisions of the Revised Statutes (2 R. S., 733, § 3).

Where the evidence of a witness is sought to be impeached by written statements alleged to have been made by him, the writing should be produced to the witness for inspection and examination, and questions as to the contents are not ordinarily admissible.

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Upon the trial of an indictment for murder, one C. was examined as a witness for the prisoner, and gave material testimony. Upon cross-examination he testified that on the day of the homicide he made a statement in writing, signed it with his mark, and swore to it. Various questions were then asked him with intent to show that he had made statements in conflict with his testimony. These questions were not objected to. Witness denied the making of such statements. The written statement was produced to the witness, and was also identified by the officer to whom it was made. It contained statements in conflict with C.'s evidence, and substantially as stated in the questions put to the witness. After the prisoner's counsel rested, this statement was offered in evidence by the prosecution. It was objected to as incompetent. *Held*, that the objection was properly overruled; that if any part of the statement was objectionable as not relating to inquiries which had been made of the witness, that objection should have been specifically taken.

The counsel for prisoner, on his examination of C., showed by him that the written statement was made while he was under arrest, and that he supposed he would be discharged upon signing it. The prosecution then called the officer under whose direction the statement was made, and asked him if he held out any inducement or used any compulsion to induce C. to make and sign it. To this question the prisoner's counsel objected, and objection was overruled. *Held*, no error.

A writ of error from this court to review a conviction and judgment in a criminal case only brings up the record and matters in the nature of a record, together with the bill of exceptions, if any, settled in the case. Only legal errors appearing in the record or by exceptions taken upon the trial can be considered. This court has no power to review an irregularity complained of, not appearing by the record, but occurring out of court, and presented by affidavits attached to the record and contained in the return.

Its jurisdiction is not extended in this respect in cases coming here on writs of error to the Superior Court of Buffalo, by the provisions of section 35 of the act amending the act establishing that court (§ 85, chap. 361, Laws of 1857). By the terms of that section the decisions of the General Term of that court are only to be reviewed here "in the same cases and in the same manner as if made by the Supreme Court."

(Argued November 26, 1872; decided December 8, 1872.)

ERROR to the General Term of the Superior Court of the city of Buffalo to review judgment affirming a judgment of the criminal term of that court, entered upon a conviction of plaintiff in error of the crime of murder in the first degree, in killing one Patrick Fahey.

A motion for a new trial was made at General Term,

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founded upon the judgment record, bill of exceptions, and certain affidavits, which presented certain alleged irregularities of the jury. The facts pertinent to the questions presented are sufficiently stated in the opinion.

Lyman K. Bass for the plaintiff in error. The Superior Court of Buffalo has no authority to order its talesmen to be drawn from the bystanders or the city at large, in the discretion of the sheriff. (Laws 1854, 228; Laws 1857, 754; Laws 1870, 738; Laws 1839, chaps. 186, 210; Laws 1840, chap. 251.) The provisions of section 29, Laws 1854, chap. 96, which relate to talesmen, must be regarded as imperative. (*Mayor of N. Y.* v. *Furze*, 3 Hill, 612; *The King* v. *Mayor of Hastings*, 1 Dowl. & Ryl., 148 [16 Eng. Com. Law, 23]; 1 Smith Com., 727, "Leases;" 2 Bouvier's Law Dict., 163, "May.") It was error to allow the written statement of the witness Curran, made out of court, to be read in evidence against the accused. (*Morrison* v. *Myers*, 11 Iowa, 538; Roscoe's Crim. Evi., 13; *Queen's Case*, 6 Eng. Com. Law, 117; *Sprague* v. *Cadwell*, 12 Barb., 517; *Mendenhall* v. *Banks*, 16 Ind., 284; *Wiggins* v. *Holman*, 5 id., 501; *Mc Vey* v. *Blair*, 7 id., 590; *Robb* v. *Hackley*, 23 Wend., 50; *Dudley* v. *Bolles*, 24 id., 465; *People* v. *Finnegan*, 1 Park. C. R., 147; Laws 1871, chap. 720, § 16, p. 1648.)

B. H. Williams for the defendants in error. The court had authority to summon talesmen as jurors. (*Cool* v. *Smith*, 1 Black., 459; *Wood* v. *U. S.*, 16 Pet., 342; 10 Barb., 448; *Hartford* v. *U. S.*, 8 Cranch, 109; *Brown* v. *County Com'r*, 21 Penn., 37; *Street* v. *Commonwealth*, 6 Watts & Serg., 209; *Bowen* v. *Lease*, 5 Hill, 221; *Williams* v. *Potter*, 2 Barb., 316; *People* v. *Deming*, 1 Hilt., 271; Potter's Dwarris on Statutes, 144, 145, 156; *Ogden* v. *Strong*, 2 Paine, 584; 1 Kent Com., 162; *People* v. *Draper*, 15 N. Y., 532; *McCartee* v. *Orphan Asylum Society*, 9 Cow., 437.) The statement made by Curran was properly admitted in evidence. It was competent for the purpose of contradicting and impeaching him as a witness. (*Crowley* v. *Page*, 7 C. & P., 791; *The*

State v. *George*, 8 Ired., 324; *Smith* v. *The People*, 2 Mich., 415; also Phil. on Evi., 960, vol. 2, 4th Am. ed.; *Patchin* v. *The Astor Mut. Ins. Co.*, 3 Kern., 268; *Clapp* v. *Wilson*, 5 Den., 285; 1 Phil. on Evi., 293–296; *Stephens* v. *People*, 19 N. Y., 573; 17 Mass., 160; 9 Cush., 338; 3 Gray, 463.) The reading of the entire statement could not prejudice the prisoner. (*Shorter* v. *People*, 2 N. Y., 193; *People* v. *Gonzales*, 35 id., 49; *Starin* v. *People*, 45 id., 341.) The objection that the statement is incompetent is too general to enable the defence to raise questions of error. (18 Johns., 544; 20 id., 353; 5 id., 467; 8 id., 495; 6 Barb., 335; 38 N. Y., 186; 6 Trans. App., 242; 2 Seld., 235; 6 Hill, 407; 18 N. Y., 451; 32 id., 440; 20 id., 32; 5 Den., 285; 3 Park. Crim. R., 50; *McDonald* v. *Smith*, 47 Barb., 530; *Shaw* v. *Smith*, 3 Keyes, 316; *Wilson* v. *N. Y.*, 3 id, 381; *Hochreiter* v. *People*, 1 id., 66; *Atkins* v. *Ewell*, 45 N. Y., 753; *Jackson* v. *Cooper*, 20 Johns., 357; *Newton* v. *Harris*, 6 N. Y., 345; *Mallony* v. *Perkins*, 9 Bosw., 572; *Elwood* v. *Deifendorf*, 5 Barb., 398; *Staats* v. *Hudson R. R. R. Co.*, 23 How. Pr. R., 463.)

ANDREWS, J. Upon the trial of this indictment the regular panel of jurors having been exhausted and but five competent jurors having been obtained, the counsel for the prisoner moved the court to order and direct that talesman to complete the jury be drawn from the list of jurors for the Superior Court of Buffalo, returned by the assessors of the city to the clerk of that court.

The court denied the motion and directed the sheriff to summon fifty tales jurors; and from the jurors so summoned, according to this direction, the remaining seven jurors were selected to try the indictment.

The counsel for the prisoner excepted to the refusal of the court to grant the motion, and to the order made.

The Superior Court of the city of Buffalo was created by chapter 96 of the Laws of 1854.

By sections 9 and 10 of the act, civil jurisdiction in specified

cases was conferred upon the court, and by section 31 jurisdiction was given to inquire by grand jury of all crimes, and to try and determine all indictments found in said court, or sent there by another court, for crimes committed in the city of Buffalo.

By the twenty-eighth section a list of petit jurors, to serve at said court from the residents of the city, is to be made by the assessors of the city and returned and filed with the clerk of the court in May of each year; and the twenty-ninth section declares that, from the list so returned the clerk, in the presence of one of the justices of the court shall, at least fourteen days prior to any term of the court for the trial of issues of fact by a jury, draw thirty-six persons, or such other number as the court may order, to serve as petit jurors; and that the persons so drawn shall be summoned by the sheriff of Erie county, in the manner prescribed by law for summoning jurors in the Supreme Court.

The order made on the trial was made in pursuance of the provisions of section 3, title 5, chap. 2, part 4 of the Revised Statutes, which provides as follows: "When twenty-four jurors, duly drawn and summoned, do not appear, or when, by reason of there being one or more jurors impanneled, or in consequence of jurors being set aside, or for any other reason there shall not remain twenty-four ballots containing the names of jurors then attending, the court shall order the sheriff to summon from the bystanders, or from the county at large, so many persons qualified to serve as jurors as shall be necessary to make, at least, twenty-four jurors, from whom a jury for the trial of the indictment may be selected."

If this section applies to the trial of indictments in the Superior Court of Buffalo, there was no error in the order made. One of the contingencies specified in the section had arisen, upon which the authority given by the section could be exercised.

The chapter in which the section is found is entitled: "Of proceedings in criminal cases." The title preceding the

one containing this section relates to the return and summoning of grand jurors, with their powers and duties: the finding of indictments and proceedings thereon, and other proceedings in criminal cases. And the title containing the section in question is entitled: "Of trials for offences, bills of exception, and other proceedings incident to trial."

There is nothing in the act establishing the Superior Court, of the city of Buffalo, excluding the application to that court of the general provisions of the Revised Statutes relating to the finding and trial of indictments, except in respect to the drawing the panel of jurors for the terms of that court. Many of the provisions manifestly apply.

There is no provision in the Superior Court act in relation to the review of judgments on conviction in criminal cases.

The right of defendant to tender a bill of exceptions is given by section twenty-one of the title in which section three in question is found, and in the same title are provisions relating to evidence to be given on trial of certain indictments, and awarding separate trials in case of persons jointly indicted for a felony, when demanded by either.

That these and other provisions in the title have a general application as well to the Superior Court as to other courts of record having criminal jurisdiction is apparent.

And we see no reason why section three should not be deemed also to apply to that court. If it does not apply, then, until the amendment of the Superior Court act in 1857, there was no provision of law whereby tales jurors could be summoned.

The twenty-ninth section of the act of 1854, before referred to, was amended by chapter 754 of the Laws of 1857, by adding thereto as follows: "The court for the trial of issues of fact or for the trial of indictments may, in its discretion, order talesmen to be drawn from said list, and may order the sheriff to summon the same forthwith, and if any person so drawn as a talesman shall not be found by the sheriff the court may cause the name of such person to be returned to the box."

It is claimed that by this amendment the power of the court to summon additional jurors is limited to the method therein prescribed.

But it is to be observed that the statute of 1857 does not purport to repeal the prior statute applicable to the same subject, nor is there any repugnancy or inconsistency between them. The court by that statute is authorized in its discretion to pursue the method, in procuring additional jurors, therein prescribed, but that method is not in terms or by necessary implication exclusive.

The next question arises upon the admission by the court of a written statement made by one Curran, a witness on the part of the prisoner, offered in evidence by the prosecution.

The theory of the case and the proof on the part of the people was that the death of Fahey was caused by a pistol-shot, fired by the prisoner, in Sweeney's saloon, in Buffalo. The deceased was found by the officers in a dying condition on the sidewalk, a street distance from the saloon. The witness, Curran, testified on behalf of the prisoner, that the deceased, the prisoner, the witness, and some other persons, were together in the saloon shortly before the pistol-shot was fired; that Fahey left the saloon before the others, leaving behind the prisoner and some other persons, including the witness, engaged in playing cards; that about twenty-five minutes afterward a report came to the door that a man outside was hurt, and that the prisoner with the others, then rose from the table where they were sitting and went out and found the deceased lying upon the sidewalk, wounded and dying.

This was material testimony, and, if true, was inconsistent with the theory of the guilt of the prisoner.

It appeared from the evidence that Curran and others were arrested on the morning of the occurrence, and were detained for examination.

The witness, Curran, testified on his cross-examination that while in custody, and on the day of the homicide, he made a

statement in writing to the superintendent of police, and signed it with his mark, and swore to it.

In reply to an inquiry, whether he did not state that the deceased left the saloon, followed by the prisoner, he said "I do not think I did." He was then asked, "Did you not further state that a report came to the door, shortly after, that some one was hurt?" and he answered "I do not believe I did."

The written statement was then shown to the witness, and he was asked if he signed it, and he said "I do not know; I made my mark to the statement."

The statement was identified by the officer to whom it was made.

After the prisoner's counsel rested his case the written statement of Curran was offered in evidence by the prosecution, and was objected to by the prisoner's counsel as incompetent; the objection was overruled, and the statement was read in evidence.

It is competent for a party on the trial to prove that a witness, on the part of his adversary, has made oral statements inconsistent with evidence upon a material question given by such witness on the trial, for the purpose of impeaching the credibility of a witness, and weakening the force of the evidence. But it is requisite that the party offering the impeaching evidence should first call the attention of the witness to the circumstances under which the statements were made, that he may have an opportunity of correcting the evidence given on the trial, or of explaining the apparent inconsistency between his evidence and his former statements.

The reason of the rule applies as strongly to written as to oral statements made by the witness; and when his evidence is sought to be impeached by written statements, alleged to have been made by him, the writing should be first produced, so that he may have an opportunity for inspection and examination. And as the writing is the best evidence of the statement made by the witness therein, ques-

tions as to the contents are not ordinarily admissible. (*The Queen's Case*, 2 B. & B., 287; *Newcomb* v. *Griswold*, 24 N. Y., 298; Greenleaf on Evidence, § 463; 2 Phillips on Evidence, 962.)

In this case the paper was shown to the witness, and he had the opportunity for examination. There was no objection to the questions asked him as to its contents.

The statements contained in it were material to contradict the evidence of the witness on his examination in chief; and the objection to it, on the ground of incompetency, was properly overruled.

If any part of the statement was objectionable, as not relating to inquiries which had been made of the witness, that objection should have been specifically taken.

And, on examination of the paper, it does not appear to contain any material facts, except such as were conceded, or were within the scope of the contradiction, which the prosecution was authorized to make.

The witness (Curran), on his examination by the prisoner's counsel, testified that the written statement was made while he was under arrest; and that he supposed he would be discharged from the arrest when he should sign the paper.

The officer, under whose direction the statement was made, was subsequently called by the prosecution, and was asked if he held out any inducement or used any compulsion to induce the witness to make and sign it.

To this question the prisoner's counsel objected, and the objection was overruled, and the prisoner's counsel excepted, and the witness answered in the negative.

We perceive no error in this ruling. The prisoner's counsel had given evidence tending to show that the witness, when he made the statement, may have been influenced by fear, or the hope of personal advantage; and the question was designed to dispel this inference, and to show that the statement was voluntary. The only remaining question relates to the irregularity, on the part of the jury, in procuring and reading,

a newspaper report of the trial after the case was submitted to them; and also in reading, during their deliberations, the portion of the Revised Statutes containing the definition of murder and manslaughter.

The allegations upon these subjects are contained in certain affidavits, which are presented, and annexed to the judgment record and the bill of exceptions.

This case comes before us on a return to a writ of error, issued out of this court to the Superior Court.

The Revised Statutes authorize the review of a conviction and judgment in a criminal case upon a writ of error, which, by the well settled doctrine of this court, only brings up the record and matters in the nature of a record, together with the bill of exceptions, if any, which has been settled in the case.

Neither the Supreme Court nor this court can grant a new trial in a criminal case upon the merits. And if this indictment had been found and tried in the Oyer and Terminer, the only remedy, if any, which the prisoner could have had, for the irregularity of which he complained, would have been upon application for a new trial to the court before which the trial was had.

It is only legal errors which can be considered on writs of error; errors appearing in the record, or by exceptions taken upon the trial.

The statute authorizes exceptions to be taken by the defendant upon the trial of an indictment to any decision of the court, and provides that a bill of exceptions may be settled and returned upon a writ of error. (2 R. S., 736, § 21.) And no assignment of errors, or joinder in error, is necessary; but the statute declares that the court shall proceed on the return to a writ of error, "and render judgment upon the record before them." (2 R. S., 741, § 23.) In *Willis* v. *People* (32 N. Y., 715), the prisoner, after his conviction for homicide, made a motion for a new trial upon affidavits tending to show that one of the jurors had, before the trial, formed and expressed an opinion that the prisoner was guilty.

Opinion of the Court, per ANDREWS, J.

The application was denied, and the Supreme Court, upon the affidavits which had been returned with the record, heard and decided the question raised upon the merits. This court held that the question was not reviewable here; and DENIO, J., said: "The matters stated in the affidavits upon which the motion was made in the Oyer and Terminer took place out of the court. They could not be made to appear by the record, for they formed no part of the proceedings; and they could not be the subject of exception, for they did not take place on the trial, and were not brought to the attention of the court until after the verdict was given."

In the *People* v. *Thompson* (41 N. Y., 1) the prisoner was convicted of manslaughter in the second degree, and, although it appeared by the evidence that the prisoner was not guilty of that offence, the court held that, as there was no exception, it could not reverse the judgment.

These views are decisive against the power of this court to review the irregularity complained of, unless it is given by section 35, chap. 361, Laws of 1857, amending the act establishing the Superior Court. That section declares that the General Term of that court shall have "exclusive power in criminal cases on motion on the indictment, with or without a bill of exceptions, to review its decisions and judgments, and grant new trials; and the *Court of Appeals* shall have exclusive jurisdiction to review the decisions and judgments made at the General Term in criminal cases, *in the same cases, and in the same manner, as if made by the Supreme Court.*"

It is unnecessary to decide whether this section was intended to confer on the General Term of the Superior Court power to grant new trials, except for legal errors committed on the trial, which would appear upon the record or bill of exceptions, if the motion was made thereon.

But this court, by the terms of the act, is only to review the decisions and judgments of the General Term, in the *same cases*, and in the *same manner*, as if the decisions

and judgments had been made and rendered in the Supreme Court.

We are of the opinion that the act in question does not, and was not intended to extend the jurisdiction of this court, in respect to cases coming here on writ of error to the Superior Court; and we reach this conclusion with less reluctance, as, upon a careful examination of the affidavits, we are satisfied that the prisoner was not prejudiced by the misconduct of the jury.

The judgment appealed from must be affirmed.

All concur. RAPALLO, J., not voting.

Judgment affirmed.

SAMUEL C. BROWN, Appellant, *v.* CHARLES LEIGH, Respondent.

No judgment can be entered upon a remittitur of an order of this court reversing an interlocutory order of the Supreme Court, nor can the costs of the appeal be adjusted by the clerk. The proceedings are interlocutory, and costs are to be adjusted and collected as other interlocutory costs are collected.

Upon motion to set aside a judgment for costs entered upon such a remittitur, the court may make a proper order for the recovery of the costs; but its refusal so to do does not affect a substantial right, and is not appealable.

Appeals to this court from orders are not within the exceptions of subdivision 5 of section 307 of the Code. But where costs are given the successful party is entitled to full costs. (Code, § 307, sub. 6.)

(Argued November 26, 1872; decided December 3, 1872.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, affirming an order of Special Term vacating a judgment for costs in favor of plaintiff entered upon remittitur from the Court of Appeals and setting aside the adjustment of costs by the clerk.

A motion was made by defendant at Special Term to set aside an amended complaint herein. The motion was granted and the order was affirmed at General Term. Upon appeal

to this court the order was reversed and motion denied with costs. Plaintiff obtained upon the remittitur an *ex parte* order that the judgment and order of the Court of Appeals be made the judgment of the Supreme Court, and that plaintiff have execution therefor; and upon such order plaintiff's costs were adjusted by the clerk and judgment entered therefor. The following are the items of costs allowed:

Before argument.....	$30 00
For argument.....	60 00
For preparing and serving papers.....	20 00
Costs of motion to dismiss appeal.....	10 00
Printing papers on appeal.....	23 50
Fare and expenses to Court of Appeals, Albany, N.Y,	10 00
Clerk entering judgment.....	50
Execution.....	69
Clerk of Court of Appeals.....	3 50

Defendant, thereupon, moved to set aside the judgment and the adjustment of costs, which motion was granted.

E. J. Maxwell for the appellant. In this court all appeals are on the same footing, and general costs follow whether the appeal be from an order or judgment. (*White* v. *Anthony*, 23 N. Y., 164; 5 Tiff. & Smith Pr., 130; *Taunton* v. *Grot*, 9 Abb., 453; *Hall* v. *Eramos*, 9 Abb. Pr., 453, note; 10 How., 117; *Borst* v. *Levy*, note to Calendar 1869, Court of Appeals.) The judgment was properly entered. (25 N. Y., 484; 9 Abb., 453; 2 Tiff. & Smith Pr., 130; 6 Robt., 497; 23 N. Y., 347; 1 Abb. Pr., 262; 17 id., 293, affirmed by Ct. App.; *Macgregor* v. *Buell*, 17 Abb., 31; 22 Barb., 86; 16 Abb., 413; 26 How., 170.) The items of disbursements were properly allowed by the clerk. (*Cuyler* v. *Coats*, 10 How., 141; *People* v. *Oaks*, 1 id., 195; *Lyon* v. *Wilks*, 1 Cow., 591; 28 How., 159; 11 Paige, 193; 2 Til. & Shearman, 679.)

Opinion of the Court, per ALLEN, J.

P. V. R. Stanton for the respondent. The motion being interlocutory, plaintiff was not entitled to a general judgment for costs. (Code, § 245; *Sutherland* v. *Tyler*, 11 How. Pr., 251; *Belmont* v. *Penwert*, 3 Robt., 693; *Moza* v. *Sun Mut. Ins. Co.*, 22 How. Pr., 62.) The right to costs is purely statutory. (*Clark* v. *Dewey*, 5 J. R., 251; *Waterman* v. *Van Benscotten*, 13 id., 425; *The Supervisors* v. *Briggs*, 3 Den., 173; *Wickham* v. *Seeley*, 18 Wend., 649; *Montgomery County Bank* v. *Albany City Bank*, 3 Seld., 459; Code, § 303; *Borst* v. *Levy* [Ct. App., 1869]; *Ely* v. *Holton*, 15 N. Y., 600.) The clerk can only adjust costs in a final judgment. (Code, § 311; *Nellis* v. *De Forest*, 6 How. Pr., 413; *Dudley* v. *Mahew*, 3 N. Y., 9.)

ALLEN, J. The order from which the plaintiff has appealed does not affect a substantial right, and is not, therefore, appealable to this court. The defendant by his application only sought to be relieved from a judgment, which he claimed to be irregular, and an adjustment of costs, which he claimed to be unauthorized. In both positions he was right, and entitled to his motion. No judgment could be entered upon the remittitur of the order of this court reversing an order of the Supreme Court.

The proceedings were interlocutory, and did not authorize the entry of a final judgment. The Code defines a judgment, and prescribes the mode of its recovery, and the formula for its perfection. (Code, §§ 245, 274, *et seq.*) An entry of a judgment for costs upon an interlocutory order is nowhere authorized. So, too, the clerk is only authorized to adjust costs when they enter into a judgment. (Code, § 311.) In interlocutory and special proceedings, the costs are to be adjusted by the judge or court before whom the same may be heard, or in such manner as the judge or court may direct. (Id.) The court did not decide that the plaintiff was not entitled to the costs of his former appeal, and the order now appealed from did not affect his right to them. It only left him to apply for their adjustment and a proper order for their

payment, as he should be advised. Doubtless the court might upon this application have adjusted the costs and made the proper order for their recovery, but it was not thought expedient, and no legal or substantial right of the plaintiff was violated by the omission. The former order of the Supreme Court having been reversed, with costs, the plaintiff, then the appellant, was entitled to full costs of an appeal to this court. (Code, § 307.) Appeals to this court from orders are not within the exceptions in sub. 5 of this section. The plaintiff was entitled under the order of this court to the costs claimed, except costs on motion to dismiss appeal, $10, and expenses to Court of Appeals, Albany, $10, and entering of judgment and the execution, $1.19; and the court would undoubtedly, upon a proper application, have adjusted them in accordance with these views, and they would have been collectible as other interlocutory costs are collected. But the order of the court, merely setting aside proceedings as irregular, did not affect a substantial right, and therefore the appeal must be dismissed, with costs.

The costs of the two appeals from orders will about balance each other, and the Supreme Court can, in its discretion, make the proper order for setting off one against the other, and for the payment of any difference to the party entitled.

The order now appealed from did not affect in any way the progress or result of the litigation between the parties, or bear at all upon the merits of the controversy, but in this respect it does not differ from the great majority of orders brought here by appeal. Not one in ten of the appeals from orders to this court affect in any way the merits of litigations, and only add to the expense of legal controversies, and hinder and delay their final termination. There appears to be a mania for taking the judgment of the court of last resort upon the

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most trifling controversies and the most immaterial orders. It is right, therefore, that parties should pay the costs.

Appeal dismissed, with costs.

All concur.

Appeal dismissed.

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JOHN MONCRIEF, Appellant, *v.* THEODORE ROSS et al., Respondents.

M. by his will devised the net income arising from his real estate to his mother during her life, and upon her death directed his executor to sell all his real estate with the exception of one piece, and out of the proceeds to to pay his sister J. $20,000 and the residue to his sister A. The mother died during the lifetime of the testator. The testator died, leaving plaintiff (his brother) and the two sisters his only heirs. After his death the executor received the rents of the real estate. Plaintiff claimed one third thereof, and asked for an accounting. *Held*, that the will gave the executor no title to the real estate, or right to receive the rents and profits; but as the sale was directed to be made immediately after the death of the mother, and the direction was absolute; by this power the land was equitably converted into money, and would be so regarded, and that the entire proceeds belonged to the sisters.

Germond v. *Jones* (2 Hill, 569) and *Campbell* v. *Johnson* (1 Sandf. Ch.. 148), distinguished.

(Submitted November 29, 1872; decided December 3, 1872.)

APPEAL from judgment of the General Term of the Common Pleas for the city and county of New York, affirming a judgment in favor of defendants, entered upon the report of a referee.

The action was brought to compel defendant Ross, as executor of the last will and testament of James Moncrief, to account for the rents collected by him from the real estate of the deceased, and to pay to plaintiff one-third thereof. James Moncrief died February 1, 1871, seized of a large amount of real estate situate in the city of New York, leaving plaintiff, his

brother, and defendants Agnes A. Moore and Jane Moncrief, his sisters, his only heirs him surviving. He left a last will and testament, of which the following is a copy:

"I, James Moncrief, of the city of New York, do make, publish and declare this to be my last will and testament, hereby revoking, and making null and void, all other and former wills by me made, as follows: 1st. I direct that all my just debts and funeral expenses be paid as soon as convenient after my decease. 2d. I give and bequeath the sum of $500 per annum, payable quarterly from and after my decease, for and during the lifetime of my mother, to each of my sisters. 3d. I give, devise and bequeath the right of burial in my Oakhill Cemetery plot to my mother, brother and sisters, and brother-in-law, and the fee thereof unto the children of my sister Agnes, and their respective heirs and assigns forever. 4th. I give and bequeath all my personal estate to my mother. 5th. I give, devise and bequeath the net income arising from my real estate unto my mother, for and during her natural life, and at and upon her death, after paying the expenses of her suitable and proper burial. 6th. I direct that my plot aforesaid be properly inclosed, and a vault and monument be erected thereon. 7th. Thereupon I direct my executor to sell and dispose of all the real estate whereof I may die seized, possessed or entitled, except the plot aforesaid, at public or private sale, hereby authorizing and empowering him to make and deliver proper conveyances for the transfer to the purchasers thereof. 8th. Out of the proceeds of such sale I give, devise and bequeath the sum of $20,000 to my sister Jane, and her heirs and assigns forever. 9th. The rest and residue thereof I give, devise and bequeath unto my sister Agnes, and her heirs and assigns forever. Lastly. I nominate and appoint my friend, Theodore Ross, executor of this my last will and testament. In testimony whereof I have subscribed my name and affixed my seal this 24th day of February, in the year of our Lord one thousand eight hundred and sixty-eight.

"JAMES MONCRIEF" [L. S.].

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The mother of the testator died before him, to wit: September 3d, 1869. The will was duly admitted to probate, and the executor collected the rents of the real estate, some portions of which remained unsold at the time of the trial. The referee directed the dismissal of the complaint, and judgment was entered accordingly.

David McAdam for the appellant. The executor took no estate in the realty devised by the will. (*Right & Phillips* v. *Smith*, 12 East, 455; *Gregory* v. *Henderson*, 7 Taunt., 772; Coke on Litt., ed. 1818, vol. 2, p. 118, and notes; Sugd. on Powers, 3d Am. ed., marg. p. 120, and notes; 3 R. S., 5th ed., 20, § 75.) The executor had a mere power of sale, and until the exercise of it the heirs were entitled to the rents. (*Johnson* v. *Schauber*, 7 Cow., 107; 3 Cow., 651; 4 Wash. C. C., 278; *Martin* v. *Martin*, 28 How., 385; and see 2 Bradf., 107; 43 Barb., 175; 3 Comst., 276; 26 Barb., 224; *Hopkins* v. *Hopkins*, cases, Tempore Talbot, 44; Sugd. on Powers, 3d Am. ed., marg. p. 120, and notes; Coke on Litt., ed. 1818, vol. 2, p. 118; *Doe* v. *Shotter*, 8 Ad. & El., 905; Hilliard on Real Estate, 3d ed., p. 591, subd. 17; *Walker* v. *Quigg*, 6 Watts, 89; *Jackson* v. *Jansen*, 6 Johns., 73; *Bloomer* v. *Waldon*, 3 Hill, 361; *Sharpsteen* v. *Tillon*, 3 Cow., 651; *Campbell* v. *Johnson et al.*, 1 Sandf. Ch. R., 148; *Allen* v. *De Witt*, 3 Comst., 276; Law of Trust and Trustees, Tiff. & Bull., 750, ed. of 1862, and authorities there cited; Hill on Trustees, 2d Am. ed., marg. pp., 235, 236, and authorities there cited; Caines' Cas. in Error, 1–16.) The legal estate was in the heirs, subject to the execution of the power of sale. (*Allen* v. *Dewitt*, 3 Comst., 278, citing Chance on Powers, 172, § 454; 1 R. S., 737, § 121; 5 Seld., 411.) The legacy to the mother lapsed by her death to the heirs, who have a right to an accounting. (*Savage* v. *Burnham*, 17 N. Y., 574, 575; 31 How., 128; *Wright* v. *Wright*, 16 Ves., 191; Rop. Leg., 471–531; *Digby* v. *Legard*, 3 P. Wms., 22; *Bagwell* v. *Dry*, 1 id., 700; *Pelt* v. *Chapman*, 1 Ves., Sr., 542; *Wood*

v. *Brown*, 34 N. Y., 337; *Campbell* v. *Johnson*, 1 Sandf. Ch. R., 148.)

J. S. Bosworth for the respondents. A testator, by the terms of his will, may make land money, or money land. (Jarman on Wills, vol. 1, pp. 473–480; Redf. on Law of Wills, vol. 2, 125, 126.) The land was equitably converted into money and the proceeds belonged to the sisters. (*Manice* v. *Manice*, 43 N. Y., 303; *Bogert* v. *Hertell*, 4 Hill, 500.) The fee of the real estate vested in the executors by necessary implication of law. (*Doe* v. *Homfay*, 6 Ad. & El., 206; 3 R. S., 5th ed., 15, § 50; *Bogert* v. *Hertell*, 4 Hill, 500; *Manice* v. *Manice*, 43 N. Y., 303.)

GROVER, J. The testator, by the fifth clause of his will, devised the net income arising from his real estate to his mother during her life, and at and upon her death, after paying the expenses of her suitable burial. By the sixth clause he directed that a burial plot owned by him in a cemetery be properly inclosed and a vault and monument erected thereon. The seventh clause is as follows: "Thereupon I direct my executor to sell and dispose of all the real estate whereof I may die seized, except the plot aforesaid, at public or private sale, hereby authorizing and empowering him to make and deliver proper conveyances for the transfer to the purchaser thereof." By the eighth clause he gave out of the proceeds of the sale the sum of $20,000 to his sister Jane, one of the respondents, and her heirs and assigns forever. By the ninth, he gave the rest and residue thereof unto his sister Agnes, also a respondent, and her heirs and assigns forever. The mother died during the life of the testator. The testator died seized of considerable real estate in the city of New York, leaving the appellant, his brother and the above mentioned sisters his only heirs. The respondent, the executor, after probate of the will, received the rents of the real estate. The appellant in this action claims an account of such rents and payment to him of one-third thereof, which he claims to be entitled to as one

of the heirs of the testator. Whether he is so entitled is the only question in the case.

By the death of the mother in the life of the testator, the devise to her of the net rents and profits during her life lapsed, but by the true construction of the residue of the fifth clause the payment of her funeral expenses were charged upon the proceeds of the real estate. By the sixth clause the cost of inclosing the burial plot and erecting a vault and monument thereon were made a like charge. The complaint contains no allegations in respect to either of these charges upon the proceeds of the estate, and the presumption is that the funeral expenses of the mother have been paid, and the plot inclosed, and vault and monument erected thereon, and properly paid for, but whether so or not is not material. As above remarked, the only question made in the case is whether the appellant, as heir of the testator, is entitled to receive a portion of whatever rents and profits may have been received by the executor before the real estate is sold under the power given by the seventh clause of the will. The position of the appellant is that this seventh clause does not give to the executor any title to the real estate. That consequently such title descended to him, subject to the execution of the power of sale by the executor, and that the heirs are, as owners, entitled to the rents and profits until such execution. The first proposition is correct. The seventh clause does not give to the executor any title to the real estate in trust or otherwise, or right to receive the rents and profits, but confers upon him a general power, in trust, to sell the land. (1 N. Y. Statutes at Large, 684, § 94.) In this respect the statute is the same as the pre-existing law, and were there no other provisions in the will to affect the question, the title, as claimed by the appellant, descended to the heirs, subject to the execution of the power of sale, and as owners they were entitled to the rents and profits accruing intermediate the death of the testator and such execution (*Jackson* v. *Schauber*, 7 Cowen, 187; reversed, 2 Wend., 258), but upon what ground does not appear (*Sharpsteen* v. *Tillou*, 3 id., 651).

But by the seventh clause a sale was directed to be made immediately after the death of the mother. This direction was absolute, and performance of the duty would have been enforced in equity. (1 N. Y. Statutes at Large, 684, § 96.) The execution of the power was not made dependent upon any contingency or the exercise of any discretion by the donee. Hence, by the power, the land was equitably converted into money from the time the sale was directed to be made, and will be so regarded thereafter in equity for all purposes. (*Bogert* v. *Hertell*, 4 Hill, 492; 1 Jarman on Wills, 525, 530.) This is upon the principle that equity regards as done what ought to be done. (*Manice* v. *Manice*, 43 N. Y., 303; *White* v. *Howard*, 46 N. Y., 144.) It follows that the land must be regarded as converted into money for the purpose of determining who is entitled to the proceeds, whether arising from income or a sale. So regarded by the eighth and ninth clauses of the will, the entire proceeds of the land, except the funeral expenses, etc., are given as money to the sisters of the testator, Jane and Agnes. Any income derived from the real estate before the sale has been made, in equity clearly belongs to these sisters, and not to the plaintiff. This was the intention of the testator, apparent from the will.

The only question in *Germond* v. *Jones* (2 Hill, 569) was whether the donee of a power to sell real estate, which was in trust, so far as the proceeds were required to pay debts and legacies, but beneficial as to any residue, there might be thereby acquired seizin of the estate, thus making his wife dowerable therein. It was held that he did not. The case has no bearing upon the equitable rights of the parties in this action. *Jackson* v. *Schauber* (7 Cowen, 187) was an action of ejectment, where the only question was as to the legal title, and had nothing to do with the equitable rights of beneficiaries under the power. *Campbell* v. *Johnston* (1 Sand. Ch. 148), cited and somewhat relied upon by the counsel for the appellant in support of the heirs' right to the income in this case, will be found upon examination to have no such tendency. There the land was devised to the executors in trust,

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to sell for the benefit of the heirs of the testator. The executors having before the sale received the rents and profits, it was held that no estate vested in them under the will; that they had only a power in trust; that the land descended to the heirs, to whom the executors were accountable for the rents and profits received by them. It will be seen that the heirs were the beneficiaries under the power. Had these been different persons, the question presented by this case would have arisen in that, but being identical, no such question was discussed or determined. The executors were held accountable to the persons entitled to the money, and whether called heirs or devisees, was wholly immaterial. In this case the executor must account to the persons entitled to the money. These we have seen are the legatees to whom the proceeds of the land are given as money by the will, and not the plaintiff. He has no interest therein, whether arising from rents or sales. His complaint was for that reason rightly dismissed. This leads to an affirmance of the judgment, with costs.

All concur, except FOLGER, J., not voting.

Judgment affirmed.

ERNEST FIEDLER, Respondent, *v.* HENRY A. DARRIN et al., Appellants.

Defendant, M. M. D., was the owner of certain real estate, upon which was a mortgage in process of foreclosure. Under an arrangement with her, W. purchased the mortgage, proceeded to a sale of the premises, became the purchaser, and took title thereto. He conveyed to F., who executed to W. a bond for the amount advanced by W., secured by mortgage upon the premises. F. at the same time executed to M. M. D. a deed subject to the mortgage, with the name of the grantee in blank, with authority to her to fill the blank. W. transferred F.'s bond and mortgage to plaintiff at ten per cent discount, which was paid by defendant, H. A. D., husband of M. M. D. Soon after defendants applied to plaintiff for a loan of $1,500 for four months upon security of the property, and proposed to pay $150 for the use of the money. An arrange-

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ment was made by which plaintiff's name was inserted in the deed from F., which deed was acknowledged by F. and delivered to plaintiff, who gave checks to F.'s order, but for defendant's benefit, for the $1,500. At the same time, and as part of the same transaction plaintiff contracted to sell the premises to M. M. D. for $5,650, of which the $1,500 and the premium of $150 formed part, the sale to be consummated four months from date. Defendants remained in possession. Upon the failure of M. M. D. to perform the contract, plaintiff brought this action to recover possession. *Held*, that the transaction was in fact a loan of money, and not a purchase of the premises by plaintiff; that the deed was in effect a mortgage; that the transaction was usurious and the security void.

Although the intent is essential to constitute the offence of usury, the intent must be deduced from, and determined by the facts. The knowingly and voluntarily taking or reserving a greater interest or compensation for a loan than that allowed by law is *per se* usurious. The offence is not condoned by want of intent to violate the statute or by giving to the transaction another name than that of a loan.

Accordingly, *held*, that evidence of plaintiff as to his intent to take more than seven per cent per annum for a loan was properly excluded.

(Argued December 3, 1872; decided December 10, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, reversing judgment in favor of defendants, entered upon the report of a referee.

The action was brought to recover possession of certain real estate situate in Castleton, Staten Island.

Plaintiff claimed title under a deed from Henry A. D. Freeman. Defendants claimed that the deed was in fact intended as security for a usurious loan. The facts appear sufficiently in the opinion.

The referee found that the deed of Freeman, under which plaintiff claimed, was a security in the nature of a mortgage, and was void for usury, and directed judgment in favor of defendants for costs.

A judgment of dismissal of complaint was entered. The General Term reversed the judgment upon questions both of fact and law, and ordered that Mrs. Darrin, within four months after service of copy of judgment, should perform the contract of sale between her and plaintiff, whereupon plaintiff

should perform upon his part by giving a deed, and in case of failure upon the part of Mrs. Darrin then that plaintiff recover possession.

Simeon E. Church for the appellants. The transactions of July, 1866, and June, 1867, were loans, and were clearly usurious. (*Bardwell* v. *Howe*, Clarke, 281; id., 432; id., 540; 7 Wend., 596, 601; 4 Price, 50; 3 J. C., 66; 13 J. R., 40; 4 Pet. U. S. R., 205; *Horn* v. *Keteltas*, 46 N. Y., 605; *Low* v. *Walter*, 2 Doug., 739; *Floyer* v. *Edwards*, Cowp., 114; *Seymour* v. *Strong*, 4 Hill, 255, and cases cited; *Loyd* v. *Scott*, 4 Pet., 205; *East River Bank* v. *Hoyt*, 22 How., 178; 3 R. S., 73, §§ 2, 5; *Robinson* v. *Cropsey*, 6 Paige, 480; *Shylock's Case*, 2 Shak., 174; 2 Com. on Cont., 532; *Westcott* v. *Thompson*, 18 N. Y., 363; 39 Barb., 42.) It is always competent to show by parol that a deed, absolute on its face, was intended as a mortgage. (2 R. S., 656, § 3; *Horn* v. *Keteltas*, 46 N. Y., 606; *Stewart* v. *Service*, 21 Wend., 36; 9 id., 227; 31 N. Y., 399; *Saxon* v. *Hitchcock*, 47 Barb., 220; 2 id., 28; 42 id., 390; *Tibbs* v. *Morris*, 44 Barb., 138; 53 id., 138.)

Samuel Hand for the respondent. The transaction was a purchase by plaintiff and a conditional sale by him to Mrs. Darrin. (*Saxon* v. *Hitchcock*, 47 Barb., 220; *Baker* v. *Thrasher*, 4 Den., 493; *Brown* v. *Dewey*, 2 Barb., 28; *Glover* v. *Page*, 19 Wend., 518; *Flagg* v. *Mann*, 14 Pick., 467; *Conway's Ex'rs* v. *Alexander*, 7 Cranch, 218, 236, 237; *Reading* v. *Weston*, 7 Conn., 143; *Robinson* v. *Cropsey*, 2 Edw., 138; *Chauncey* v. *Arnold*, 24 N. Y., 330; *Hibblewhite* v. *McMorine*, 6 M. & W., 200; *Hudson* v. *Revett*, 5 Bing., 372.) No usury was proved or found. (*Billington* v. *Wagoner*, 33 N. Y., 31; *Williams* v. *Tilt*, 36 id., 219, 326; *Chamberlain* v. *Dempsey*, 36 id., 144, 148, 149; *Ohio and Miss. R. R. Co.* v. *Kasson*, 37 id., 218, 224; *Thomas* v. *Murray*, 32 N. Y., 605; *Booth* v. *Sweezy*, 4 Seld., 280; *Pomeroy* v. *Ainsworth*, 22 Barb., 119; *Hall* v. *Daggett*, 6 Cow., 653; *Quackenbush*

v. *Leonard*, 9 Paige, 339.) The referee erred in excluding the evidence as to plaintiff's intent in the transaction. (*Thurston* v. *Cornell*, 38 N. Y., 281, 287; *Cortland County* v. *Herkimer County*, 44 id., 22; *Seymour* v. *Wilson*, 4 Kern., 567.)

ALLEN, J. The court below having reversed the judgment on the report of the referee, and given judgment substantially for the plaintiff upon the facts, as well as the law, the evidence upon which the referee passed, as well as his conclusions of law, and his rulings in the progress of the trial, are before us for review. (Code, § 268.)

The case is before this court as if upon an appeal upon the law and the facts, directly from the judgment of the referee. The Code declares the question in this court to be "whether the judgment should have been reversed, either upon questions of fact or of law." (Id.) There is but little conflict of evidence; none in respect of the principal facts upon which the judgment of the referee was based. In all the findings of fact by the referee, he was abundantly sustained by the evidence. The undisputed evidence is that, prior to June, 1866, Mrs. Darrin was the owner in fee, and the defendants were in the actual possession of, and lived upon the premises in dispute. They were subject to a mortgage by a prior owner of $800, and another for over $2,000, given by her to secure a part of the purchase-money. An action had been brought to foreclose the latter mortgage, and she was in a strait for money to discharge the encumbrance and save the property, which was of greater value than the encumbrances.

By an arrangement Wagner, the attorney and friend of Mrs. Darrin, purchased the mortgage in process of foreclosure, and proceeded to a sale of the premises, and became the purchaser, taking title by deed from the sheriff, by whom the sale was made. He then conveyed the premises to Freeman, a relative and inmate of Darrin's family, subject to the smaller mortgage and the mortgage executed simultaneously with his conveyance by Freeman to Wagner for the

amount due him, over $3,000; and, at the same time, executed, acknowledged and delivered to or for Mrs. Darrin a deed of the same premises, subject to the two mortgages, but with the name of the grantee in blank; Mrs. Darrin having authority to fill the blank with her own name or that of any other person. Mrs. Darrin was, during all the time, except the brief period that the title was in Wagner, the equitable owner of the premises. Freeman took title as trustee, in fact, and merely for the purpose of passing it to Mrs. Darrin. Mrs. Darrin's rights were at all times fully recognized and acknowledged by all the parties. Soon thereafter Wagner transferred the Freeman bond and mortgage to the plaintiff at a discount of ten per cent, which was paid him by Darrin.

This transaction was concluded in October, 1866; and in June, 1867, Darrin and his wife were again in want of money and applied to the plaintiff for a loan of $1,500, for four months, upon the security of this property, and proposed to pay $150 for the use of the money for that time; and after some negotiation, and some difficulty as to the mode of consummating the transaction, an arrangement was made, by which the plaintiff's name was inserted as grantee in the Freeman deed held by Mrs. Darrin, and the deed reacknowledged by Freeman and delivered to the plaintiff, who gave his check to Freeman's order for $1,500, but for Darrin and Mrs. Darrin; and the plaintiff, at the same time and as a part of the same transaction, entered into an agreement by which the plaintiff agreed to sell, and Mrs. Darrin agreed to purchase, the premises for $5,650; of which $1,650 (that is, the $1,500 then advanced by the plaintiff, and the premium of $150) was to be paid on the 24th of October then next, which was precisely four months from the date of the contract, and the expiration of the term of credit asked for on the application for the loan. Upon the payment of the $1,650 the premises were to be conveyed, subject to the $800 mortgage, and a new mortgage taken for the balance of the purchase-money, which was the amount of the Wagner mortgage then

held by the plaintiff. From the evidence of the plaintiff and his attorney, there is no doubt that both well knew that Mrs. Darrin was the owner in fact of the property at the time of the last transactions, and all the negotiations with Mrs. Darrin were upon the basis of such ownership; and whether the legal title was in her or not is not material. She had exercised the right of control as the owner, and the plaintiff, by the negotiations and dealings with her, through her husband, had the benefit of her title, and took a conveyance in fact, if not in form, from her. He took title from her as purchaser in form, although the conveyance was from her trustee. The agreement between himself and Mrs. Darrin secured to him the repayment of the money advanced, with the usurious interest agreed upon. The evidence is, and so the referee finds, that the deed to the plaintiff, and the agreement to reconvey, were executed and delivered at the same time, and as of one and the same transaction. That a deed, absolute on its face, can be shown by extrinsic evidence to have been intended as a mortgage is well settled. (*Horn* v. *Keteltas*, 46 N. Y., 605.)

The application here was for a loan, and all the negotiations were in respect to the form of the security upon the premises in question; and there was no treaty for a purchase by the plaintiff, and no pretence that the defendants would have sold the premises for the sum actually advanced by the plaintiff, or for twice that amount. The time of repayment was the day fixed by the borrower on the first application; and the amount to be repaid, the principal sum advanced, and the ten per cent proposed to be paid, and which the plaintiff was so willing to receive. The plaintiff treated this deed and agreement of sale as a mortgage, by retaining his mortgage, and claiming the interest thereon, and by subsequently purchasing and seeking to foreclose the $800 mortgage.

When he was driving his unconscionable bargain for the loan of $1,500, he insisted upon the defendants paying in advance the interest on the mortgage then held by him. No one can fail to see that this was in fact a loan of money upon

the security of, and not a purchase, of the property by the plaintiff. It follows that the transaction was usurious, and the security void. The effect of the transaction was to secure the plaintiff more than seven per cent per annum for the loan. The agreement was vicious because of the usurious effect, by which the intent of the parties must be judged. (*Seymour* v. *Strong*, 4 Hill, 255; *Lloyd* v. *Soott*, 4 Peters, 205.) It is true the intent is essential to constitute the offence of usury; but the intent must be deduced from and determined by the acts. The intent which enters into and is essential to constitute usury is simply the intent to take or reserve more than seven per cent per annum for the loan or forbearance of money. There are cases in which an act is lawful or unlawful, depending upon the particular intent of the actor. In such cases, it is competent to prove the motive and intent of the party. (*Seymour* v. *Wilson*, 4 Kern., 567.) The intent in such case is a material fact in issue. (*Cortland County* v. *Herkimer County*, 44 N. Y., 22.) So when an act is equivocal in its character, the intent must be ascertained in order to give it its proper effect, and assign it its proper place in the transaction. (*Thurston* v. *Cornell*, 38 N. Y., 281.) But when an act is illegal the intent of the offender is immaterial. It will not avail one, who deliberately fires his neighbor's house, to swear that he did not intend to commit arson; and one who deliberately and intentionally secures to himself $1,650 at the end of four months, in return for a present advance of $1,500, cannot avoid the consequences of the act by testifying that he did not intend to take usury; that is, that he intended to give the transaction a different name from that which the law gives it, and call that a purchase and sale which the law calls a loan of money, secured by mortgage. The voluntary taking or reservation of a greater interest or compensation for the loan or forbearance of money than that allowed by law is, *per se*, usurious; but if it is taken by mistake or accident, it is not usury.

If the party intends to take and receive the amount paid, the law condemns the act, if it is within the condemnation of

the laws against usury. This was determined in *Bank of Utica* v. *Wagar*, 7 Cow., 712, affirmed on error in 8 id., 398. The offence is not condoned by the want of an intent to violate the statute, or by an attempt to evade the statute by a resort to any of the devices of which usurers have in all ages been so prolific, and which have always proved so abortive of the hoped for results. The question, therefore, to the plaintiff, as to his intent to take more than seven per cent per annum for the loan or forbearance of money, was properly excluded. An answer either way could not have changed the facts; and upon them, as confessed by the plaintiff, the law pronounces the transaction usurious. The plaintiff doubtless hoped and intended to cover up his tracks, to conceal his loan and the reservation of usurious interest, under the weak guise of a purchase and resale, and could well have sworn that he did not intend to bring himself within the condemnation of the law. But he did in fact loan his money at an illegal rate of interest, and has failed in his attempt to evade the consequences. He was but a mortgagee; and whether his mortgage was usurious or not, he was not entitled to an action of ejectment. (2 R. S., 312, § 57; *Murray* v. *Walker*, 31 N. Y., 399.)

The objections to evidence by the plaintiff were properly overruled. All the papers which were put in evidence, and all the negotiations, constituted parts of the *res gestæ*, and were competent to give character to the consummated transaction, and as tending to show the nature and object of the treaty in progress between the parties, and that it was for a loan, and that the sole object of the forms and modes adopted in preference to those rejected, was to avoid and evade the statute of usury. They were also competent to prove knowledge by the plaintiff of the rights and interests of Mrs. Darrin in the premises, and that she, through her hus-

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band, was negotiating as the owner, notwithstanding the formal and legal title was in a third person.

The judgment of the General Term must be reversed, and that of the referee affirmed.

All concur.

Judgment accordingly.

NEWELL TAFT, Appellant, *v.* WILLIAM P. CHAPMAN et al., Respondents.

Defendants, stock brokers in New York, received from one Van A., residing at Lyons, orders by telegraph to buy 2,100 shares of Erie stock, he agreeing to send margin. On the day of sending and receipt of telegrams defendants contracted for the stock ordered, to be delivered three days thereafter, at which time they were delivered to and paid for by defendants. On the day of the sending of the telegrams, but whether before or after does not appear, Van A. stole $6,500 of U. S. coupon bonds belonging to plaintiff, which he forwarded to defendants as a "margin." The bonds were received by the defendants before the delivery of and payment for the stock. In an action for the conversion of the stock,—*Held*, that defendants gave credit to the promise of Van A., and not to the bonds; that the receipt of the bonds and the fulfillment of the contract for the purchase of the stock after such receipt did not make them *bona fide* holders, and that they were therefore liable; also, that if defendants, after receipt of the bonds, purchased upon the credit thereof any stocks for Van A., they were entitled to hold them as security for any loss arising in that transaction, but the sale of bonds beyond the amount necessary for such indemnity was a conversion, for which an action would lie.

(Argued November 25, 1872; decided December 10, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department in favor of defendants, entered upon an order denying motion for a new trial and directing judgment upon a nonsuit.

This action was brought to recover the value of eight bonds (so called) of the United States government, of which five were for the sum of $1,000 dollars each, and three for the

sum of $500 dollars each. The bonds were coupon bonds, payable to bearer.

The plaintiff was the owner of the bonds, and deposited them for safe keeping in the P. R. Westfall Bank, of which Beardsley Van Alstine was the cashier. The defendants were stock brokers in the city of New York, and were correspondents of Van Alstine. He had been dealing in Erie stocks. On the 21st day of February, 1868, Van Alstine sent the defendants a telegram in these words:

"To CHAPMAN & Co., 7 Wall street:

"Buy 800 at 71 or under, and 1,000 at 70½ or under. Send margin to-day in full.

"B. VAN ALSTINE."

This telegram was sent at 8.30 A. M., received at the New York office at 9 A. M., and by the defendants before the opening of the stock board, on the 21st. In answer, defendants sent a telegram advising Van Alstine that they had bought 300 at 70¼; that the market looked sick, and that they should not buy any more unless ordered. In answer to which Van Alstine telegraphed on 21st, "Buy as directed by me; it is all right." The defendants bought as directed, and telegraphed accordingly, and added: "Send margin to-day without fail." Thereupon Van Alstine telegraphed to defendants to buy still more stock, and added, "It is all right."

On the same day Van Alstine sent $5,000 in government bonds to the defendants by express, and on the next day he sent $3,000 more as collateral to his transactions with the defendants. Included in these were plaintiff's stocks which Van Alstine had abstracted from the bank. Under these orders the defendants, on the 21st of February, contracted to purchase stock for Van Alstine to the amount of 2,100 shares, which were to be delivered and paid for on the 24th.

The defendants received the collaterals sent by Van Alstine on the 24th before they paid for the stock. Evidence was given tending to show that, with these collaterals in their hands, defendants, on the 29th of February, purchased 400

shares more of stock for Van Alstine, and at his direction. The stocks were sold by Van Alstine's directions, at a loss more than sufficient to exhaust all of his collaterals in the defendants' hands. On the 16th of March the defendants sold out the last of the collaterals, leaving him in their debt $136.26.

The plaintiff demanded the bonds of the defendants on the 18th of March, 1868.

At the close of the evidence defendants' counsel moved for a nonsuit, which was granted.

H. R. Selden for the appellant. Respondents were not *bona fide* holders of the bonds as against the plaintiff. (*Markham* v. *Jaudon*, 41 N. Y., 235; see *Phillbrick* v. *Dallett*, 12 Abb. [N. S.], 419, 425, and cases there cited; *Brown* v. *Leavitt*, 31 N. Y., 113; *Day* v. *Saunders*, 37 How., 534; *Pratt* v. *Coman*, 37 N. Y., 440; *Swift* v. *Tyson*, 16 Pet., 1, 19, 20; 12 Abb. [N. S.], 424; *Stalker* v. *McDonald*, 6 Hill, 95; *Clark* v. *Ely*, 2 Sandf. Ch., 170; *Furrington* v. *Frankfort Bank*, 31 Barb., 188; *McBride* v. *Farmers' Bank*, 26 N. Y., 454; *Cardwell* v. *Hicks*, 37 Barb., 463; *Manhattan Co.* v. *Reynolds*, 2 Hill, 140; *Youngs* v. *Lee*, 2 Kern., 555; *Rosa* v. *Brotherson*, 10 Wend., 85; *Coddington* v. *Bay*, 20 John., 645, 646; per WOODWORTH, J., pp. 650, 651; per SPENCER, J., pp. 656, 657; *White* v. *Springfield Bank*, 3 Sandf. [S. C.] Rep., 226; *West* v. *Am. Exch. Bank*, 44 Barb., 175, 178; *Andrews* v. *Dietrich*, 14 Wend., 31, 36.) Defendants were not *bona fide* holders of the bonds by means of any obligation assumed on the credit of them, for they assumed none on that account. Payment for the stock after the receipt of the bonds did not constitute them *bona fide* holders. (20 John., 650, 657; 6 Hill, 96, 100; Add. on Cont., 22; *Hunt* v. *Bloomer*, 5 Duer, 202, 205; *Smith* v. *Bartholomew*, 1 Metcalf, 278; *Cumber* v. *Wane*, 1 Strange, 426; S. C., 1 Smith's Lead. Cas., 146; *Fitch* v. *Sutton*, 5 East., 230; *Collins* v. *Martin*, 1 Bos. & Pul., 51.)

W. F. Cogswell for the respondents. Defendants were *bona fide* holders of the bonds, and acquired a good title as against the real owner. (*Murray* v. *Lardner*, 2 Wal., 110; *Fenby* v. *Pritchard*, 2 Sandf., 151; *White* v. *Springfield Bank*, 3 id., 222.)

ANDREWS, J. The defendants derived title to the bonds in question from Van Alstyne, who took them by larceny from the possession of the plaintiff, the true owner.

They were payable to bearer, and were not over due, and the title of the defendants is protected to the same extent as would be that of the endorsee of a bill or note, transferred under the same circumstances. (*Delafield* v. *The State of Illinois*, 2 Hill, 159; *Mercer County* v. *Hacket*, 1 Wallace, 95; *Murray* v. *Lardner*, 2 id., 110.)

The plaintiff's title was not lost by the transfer to the defendants, unless they were *bona fide* holders for value of the securities thus feloniously taken from his possession.

It was incumbent upon the defendants to show that they took the bonds upon some new consideration and incurred some obligation, or relinquished some existing right upon the credit of the bonds.

And if they had taken them as security for, or in nominal payment of an antecedent debt, they were not, within the decisions in this State, holders for value. (*Coddington* v. *Bay*, 20 Johns., 645; *Stalker* v. *McDonald*, 6 Hill, 93; *Barden* v. *Weaver*, 49 N. Y., 286.)

It is conceded that the defendants took the bonds from Van Alstyne in good faith, and the only question is whether they took or held them for value within the rule of law established in this State.

The defendants on the 21st of February, 1868, contracted to purchase 2,100 shares of "Erie" stock, which was deliverable to them upon their contract on the 24th of the same month.

This purchase was made, so far as it appears, in their own names, but for Van Alstyne, and in pursuance of his direc-

tions contained in telegrams sent to them on the day of the purchase, and in which he promised to send "margin" on the same day to secure them against losses by the depreciation of the stock.

The stock so purchased by the defendants was delivered to and paid for by them on the 24th, and before such delivery and payment they received the bonds in question, which had been forwarded to them by express by Van Alstyne, part on the 21st and part on the 22d of the month.

The bonds were abstracted from the bank and taken by Van Alstyne on the 21st, but whether before or after the defendants contracted for the purchase of the stock, does not appear.

The defendants, by their contract of purchase, became bound to the vendors to pay purchase price upon delivery.

They stood in the relation of sureties as between themselves and Van Alstyne, and upon payment by them of the debt, could recover the amount paid from their principal. (*Markham* v. *Jaudon*, 41 N. Y., 235; Story on Agency, § 335.) But as to the vendors they were bound, upon an original and independent contract, to pay the purchase-money.

The defendants acquired no lien or right to the bonds in question by anything which occurred on the 21st of February.

It need not be denied that a court of equity may, under special circumstances, enforce the performance of a contract to give to a creditor or surety, a specific lien, or to transfer a specific security, when relying upon the contract a credit has been given or a liability has been assumed.

But it would not follow that this principle could be applied so as to compel the transfer of a negotiable instrument to which the debtor had no title when the contract was made, so as to make the assignee a holder for value and overreach the title of the true owner. But we are not called upon to consider this question. The promise contained in Van Alstyne's telegram of the 21st of February was to send "margin," and referred to no specific security. His engagement would have been satisfied by sending money or other

security usual in such cases. It does not appear that he had abstracted the bonds from the bank when the telegram was sent, and the defendants cannot be said to have relied upon the credit of these bonds or upon the expectation that they would receive them. They gave credit to the promise and not to the bonds, and if Van Alstyne had then owned them, the defendants could not have compelled him to transfer them. The subsequent receipt of the bonds, sent in fulfillment of the promise, did not strengthen the position of the defendants.

The reason upon which the title of a party is protected, to whom a negotiable instrument is passed in good faith and for value, although it was stolen or fraudulently put in circulation, is founded upon the possession of the instrument by the assignor, at the time of the transfer, and the implication of title arising therefrom, and the credit given upon the faith thereof. In this case the credit had been given before the receipt of the bonds. Nor did the performance by the defendants of their contract to pay for the stocks after the receipt of the bonds, make them holders for value. In making such payment, they simply performed their contract with their vendors. The obligation to make it existed before the bonds were received, and was not in any way induced or affected thereby.

By the payment Van Alstyne became their debtor, by reason of the implied promise upon which a principal is held liable to reimburse the agent for any payments or advances made in his behalf and under his authority. But the payment made by the defendants is to be referred to their contract, and not to any request, express or implied, made by Van Alstyne. The validity of their contract was assumed upon the trial. They recognized its validity by performing it, and there is no ground to infer that they performed it upon the credit of the bonds, or that they would have repudiated it, if they had not received them.

The defendants are entitled to be regarded as holders for value, in respect to any new transactions entered into, or any new liability incurred by them at the request of Van Alstyne, upon the credit of the bonds after the transfer to them.

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And if the 400 shares of stock purchased for Van Alstyne on the 29th of February were bought by them upon the credit of the bonds, they were entitled to hold them as security for any loss arising in that transaction. But their lien was limited to the loss sustained, and the sale of the bonds beyond the amount necessary for such indemnity was a conversion for which an action can be maintained by the plaintiff. (*Waterbury* v. *Westervelt*, 5 Seld., 598 Addison on Torts, 311.)

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur.

Judgment reversed.

50	451
125	423
50	451
199	374
50	451
150	207

THE PEOPLE ex rel. HENRY A. FURMAN et al., Respondents, *v.* HARRISON CLUTE, Appellant.

An act was passed by the legislature in 1853 (chap. 80, Laws of 1853) purporting to amend "section 22 of chapter 20 of title 1 of the first part of the Revised Statutes, fourth edition." The provision incorporated and thus designated in the compilation of statutes referred to was not a part of the Revised Statutes, but was a statutory enactment existing prior to the revision and not repealed thereby. (Chap. 352, Laws of 1829.) *Held*, that the intent of the legislature was to amend that portion of the statute law which was to be found in printed form in the compilation referred to, and the act was effectual to make such amendment.

By the provision of the charter of the city of Schenectady, which enacts that supervisors of wards elected thereunder shall be subject to all the provisions applicable to supervisors in the towns (§ 8, chap. 385, Laws of 1862), a supervisor of a ward of that city is brought within the prohibition of the statute declaring that no supervisor of any town shall be elected or appointed to hold the office of superintendent of the poor. (Chap. 80, Laws of 1853.) By this prohibition a supervisor is not merely made ineligible to hold the office of superintendent, but he is ineligible to an election or appointment thereto.

This statutory provision does not infringe upon the constitutional rights of an elector to vote for all elective officers (§ 1, art. 2, State Constitution), nor upon his right to be elected to any office.

Where the power is reserved to the legislature to direct the method of filling an office, whether by election or appointment, it may in its discre-

tion, when conferring upon the elector the power to elect, limit the number from whom he may select, or declare one holding another office ineligible to receive his suffrage.

It seems the same legislative power exists in reference to offices created or continued by the Constitution, and thereby made elective.

A minority of the whole body of qualified electors may elect to an office where the majority decline to vote, or where they vote for one who is ineligible to the office, knowing of the disqualification. Notice of the disqualifying fact, and of its legal effect, may be given so directly to the voter as to charge him with actual knowledge of the disqualification; or the disqualifying fact may be so patent or notorious as that his knowledge of the ineligibility may be presumed as matter of law. But not only the fact which disqualifies, but also the rule or enactment of law which makes it thus effectual, must be brought home so clearly to the knowledge or notice of the elector as that to give his vote therewith indicates an intent to waste it in order to render his vote a nullity.

Where a majority of the electors, through ignorance of the law or the fact, vote for one ineligible to the office, the votes are not nullities; but while they fail to elect, the office cannot be given to the qualified person having the next highest number of votes. The election is a failure, and a new election must be had. (The rule stated which should govern in such case.)

Precedents drawn from the action of legislative committees are not satisfactory. (Per FOLGER, J.)

(Argued December 2, 1872; decided December 10, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming in part and reversing in part a judgment entered upon the decision of the court upon trial at Special Term. (Reported below, 42 How. Pr., 157.)

This action was brought to oust defendant from the office of superintendent of the poor of the county of Schenectady and to put relator in possession.

At a city election held in April, 1871, said Clute was duly elected supervisor of the fifth ward, accepted the office, and discharged its duties until the 12th day of December, 1871, when he resigned.

At the general election in 1871 the office of superintendent of the poor was to be filled by the electors of the county of Schenectady. The relator, Furman, and the defendant, Clute, were both candidates for said office, and were voted for by the

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electors. The whole number of votes was 4,676, of which Clute received 2,448 votes and Furman 2,228. Of the votes given for Clute, 295 were given in the fifth ward of the city of Schenectady, which then constituted one election district. Clute was declared elected, and having filed his official bond and taken the oath of office, he on the first day of January, 1872, entered into said office and still continues therein.

Previous to January 1, 1872, the said Furman took the oath of office and tendered and deposited with the county clerk a bond in due form and sufficiency as superintendent of the poor of said county, and claimed the said office.

There was no proof of actual notice of Clute's ineligibility to any of the electors of said county, nor proof of any facts from which notice could be implied other than his holding the office of supervisor of the fifth ward.

The Special Term decided that defendant was disqualified from holding the office; that his election was void, and conferred upon him no title to the office; that there being no proof of notice to the electors of such disqualification nor of facts from which knowledge or notice could be presumed, neither of the candidates acquired title to the office, and the election was a failure. It thereupon ordered judgment ousting the defendant from the office without costs to either party. Judgment was entered accordingly. The General Term affirmed the judgment so far as that defendant be ousted from the office, but reversed it so far as it adjudged that the relator was not entitled to the office, and directed judgment that he is so entitled, and gave him his costs.

J. S. Landon for the appellant. Chapter 80, Laws of 1853, is unconstitutional. (*Barney* v. *McCreary*, 1 Cong. Elec. Cases, 167; *Turney* v. *Marshall*, 2 id., 167; *Trumbull's Case*, 2 id., 618; *Green* v. *Shumway*, 39 N. Y., 418; *McCaffray* v. *Guyer*, 59 Penn., 109; *Page* v. *Allen*, 58 id., 338; *State* v. *Adams*, 2 Stew. [Ala.], 239; *Barto* v. *Himrod*, 8 N. Y., 483; *Sturgis* v. *Spofford*, 45 id., 446, 450; *People* v. *Draper*, 15 id., 543; *Barker* v. *People*, 3 Cow., 686.) Defendant

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was not ineligible; he was not a supervisor of a town, but of a ward of a city. (1 Black. Com., side p. 92; *Chase* v. *N. Y. C. R. R.*, 26 N. Y., 523; Potter's Dwarris, 245, note, id., 251, 255; *Hebbard* v. *Johnson*, 3 Taunt., 177.) If defendant was ineligible, the relator cannot claim to be elected. (*Wynehammer* v. *People*, 13 N. Y., 378, 392; *Rockwell* v. *Nearing*, 35 id., 302; *State* v. *Anderson*, Coxe, 318; *Commonwealth* v. *Cluley*, 56 Penn., 270; *Saunders* v. *Haynes*, 13 Cal., 145; *State* v. *Giles*, 1 Chand. [Wis.], 112; *State* v. *Smith*, 14 Wis., 497; 38 Me., 597; *Regina* v. *Hiorns*, 7 Ad. & Ell., 960; 34 Eng. Com. Law, 496; Angel & Ames on Corp., § 131; *Rex* v. *Bridge*, 1 Maule & Sel., 76; *Rex* v. *Hawkins*, 2 Dow. H. L. R., 124.) Defendant's resignation of the office of supervisor qualified him to hold that of superintendent. (*Rex* v *Trelawney*, 3 Burrows, 1615; *Milward* v. *Thatcher*, 2 Durn. & East., 87.)

E. W. Paige for the respondents. Furman was legally elected superintendent of the poor, and is entitled to the office. (State Const., art. 1, § 17; *Gostling* v. *Veley*, 7 Q. B., 437; Wilson's Dig. Parl. Law, 107, 114; *Gulick* v. *New*, 14 Ind., 97; *Carson* v. *McPhetridge*, 15 id., 331; *Hatcheson* v. *Tilden*, 4 Har. & McH., 279; *Commonwelth* v. *Read*, 2 Ashmead, 261; *Same* v. *Green*, 4 Whart., 521, 580, 581; *Same* v. *Cluley*, 56 Penn. St., 270.) That Clute was disqualified was known to the electors of the fifth ward from the evident notoriety of the fact. (Grant on Corp., 208; Male on Elections, 111; Heywood on County Elections, 359–361: Roe on Elections, 278, ed. 1818; Clerk on Elections, 173, 174; Chambers' Dict. of Election Laws, title "Disqualification," 3; Lester's Law of Elections, 11; Orme's Law of Elections, 133; Stephen's Law of Elections, vol. 1, p. 359; Warrèn's Prac. of Elec. Com., 557; Warren on Parl. and Elec. Law, 231; *Carson* v. *McPhetridge*, 15 Ind., 331; *Gulick* v. *New*, 14 id., 100; *Stewart* v. *Hayes*, 3 Chi. Leg. News, 117; *Reg.* v. *Mayor of Tewksbury*, L. R., 3 Q. B., 629; *Holman* v. *Burrow*, 2 Ld. Raymond; 1 Greenl. Ev., § 6;

Cooper v. *Phibbs L. R.*, 2 H. L., 170; *Holmes* v. *Remsen*, 4 J. C. R., 487; Broom's Legal Maxims, 201; *Galway Election Case*, 2 Moak's Eng. R., 726; 2 Shoub., 300; 1 Mod., 87–300; Grant on Corp., 208.) Chapter 80, Laws of 1853, is constitutional and valid. (*Wynehamer* v. *People*, 3 Kern., 392–395; *People* v. *Quant*, 2 Park. Cr. R., 414, and note, 687; *People* v. *Draper*, 15 N. Y., 544, per DENIO, J.; *Newell* v. *The People*, 3 Seld., 109; *Fletcher* v. *Peck*, 6 Cranch, 128; *Ex parte McCollam*, 1 Cow., 560; *Clarke* v. *Rochester*, 5 Abb. Pr., 107; 24 Barb., 446; *McCool* v. *Smith*, 1 Black., 469; *Wood* v. *U. S.*, 16 Pet., 342; 10 Barr, 448; *Hartford* v. *U. S.*, 8 Cranch, 109; *Brown* v. *County Com.*, 21 Penn., 37; *Street* v. *Commonwealth*, 6 W. & S., 209; *Bowen* v. *Lease*, 5 Hill, 221; *Williams* v. *Potter*, 2 Barb., 316; *People* v. *Denning*, 1 Hill, 271.)

FOLGER, J. The first question to be considered on this appeal is whether Clute was eligible to the office of superintendent of the poor.

It was enacted by chap. 352 of the Laws of 1829 (Laws of 1828 and 1829, p. 538) that no supervisor of any town should be appointed to hold the office of superintendent of the poor in any county.

In the compilation of statutes, commonly known as the "Revised Statutes, fourth edition," the text of this act of 1829 is incorporated as "* § 22 of title 1, chap. XX, part 1, of the Revised Statutes."

In 1853 it was enacted (Laws of 1853, chap. 80, p. 115) as follows: "§ 1. Section twenty-two, of chapter twenty, of title one, of the first part of the Revised Statutes, fourth edition, is hereby amended so as to read as follows: § 22. No supervisor of any town * * * shall be elected or appointed to hold the office of superintendent of the poor * * * in any county * * * ."

In 1862, the legislature amended the charter of the city of Schenectady (Laws of 1862, chap. 385, pp. 644–661, § 8), and enacted that the supervisors of wards to be elected thereunder

should be subject to all the provisions of law then applicable to those officers in the towns of the State.

As Clute, in April, 1871, was elected a supervisor of the fifth ward in the city of Schenectady, and held the office at the general election in that year, he is affected by these several statutes, unless for the reasons urged in his behalf they do not apply to him.

1st. It is claimed that the act of 1853 did not amend the Revised Statutes, for the reason that there existed no such Revised Statutes as was therein referred to. It is true that the act of 1829 was not, on the revision of the statute law, made a part of the Revised Statutes. And it is equally true that the legislature, by the terms of the act of 1853, did not explicitly profess to amend the act of 1829. And it is equally true that what is called the fourth edition of the Revised Statutes is not immediately the work of the legislature, but is a compilation of private persons.

But if the words "fourth edition" are rejected from the act of 1853, then it is in terms a legislative enactment for the amendment of section twenty-two of chapter twenty, title one, of the first part of the Revised Statutes.

There is a section of the Revised Statutes to which these descriptive words exactly fit. It is in title one, chapter twenty, of the first part. Its subject-matter is of the poor, and is thus of kin with the act of 1853.

We may not say, if the words "fourth edition" be rejected, that the legislature did not intend to substitute the provision in this act of 1853 for that of section twenty-two as it stands in the Revised Statutes; and in that case the substitute would be law. But it is better to consider and apply all the words used in the enactment of 1853, and give them all force as expressive of intention.

And then, as judges or as lawyers or as legislators, we know that there is a compilation of statute law, known as the fourth edition of the Revised Statutes; that it stands in the libarries; is cited upon briefs of counsel and in the opinions of judges; has State official recognition by the certificate to it of

the secretary of state; has the legislative permission of its publication so far as it reprints the Revised Statutes; and by like authority may be read in evidence.

It would be idle, then, to say that when the appellation "the Revised Statutes, fourth edition" is used in a law or elsewhere, it does not carry the mind of legislator or judge or of counsel to this compilation. It is not, then, difficult to determine what was the intention of the legislature in passing the act of 1853. It was to amend that portion of statute law which was to be found in printed form in the compilation referred to, there to first seeming set forth as section twenty-two of title one, chapter twenty of part first of the Revised Statutes. Nor is it difficult to say that such intention had effect, for the statute law there set forth in printed form is, by amendment, changed to read as runs the later enactment.

We do not, in thus holding, sanction, in the sense of giving approbation to, such a manner of legislation. It is our duty to learn, from the words which the legislature has used, its purpose. And however loose and careless may be the legislative work, if the legislative intention is made manifest, that we must uphold, unless weightier objection exists.

2d. It is claimed that Clute was supervisor of a *ward* in the city, and not of a town.

But the charter of the city, in the provision above referred to, made the supervisors of the wards thereof subject to all the provisions of law in the performance of those duties. But the charter had already said that they should perform all the duties of supervisors of towns. It needed not, for the purpose of confining them in the performance thereof to the same limits as fixed for supervisors of towns, to add the clause we are considering. It is obvious that its purpose was apart from the definition of duty, or prescription of mode of performance of it. It is not a clause of giving. It is one of restriction, of subjection, and put about Clute, as a supervisor of the fifth ward of Schenectady, all the limits which any then existing law placed around a supervisor of a town.

3d. It is claimed by the learned counsel for Clute, and certainly ingeniously argued, that the act of 1853 is unconstitutional. 1st. For that it impairs the right of suffrage, because it restricts the right of the elector to select and vote for a candidate from the whole body of electors. It is true that the privilege of suffrage is conferred, and the right to exercise it is guaranteed by the Constitution. Every elector shall be entitled to vote for all officers that now are or hereafter may be elective by the people. (Const., art 2, § 1.) And there is no provision of the Constitution which expressly empowers a limitation thereof, save those which authorize laws of exclusion of persons convicted of bribery, larceny or any infamous crime, etc. (art. 2, § 2), and laws for ascertaining by proper proofs the citizens who shall be entitled to the "right of suffrage." (Art. 1, § 4.)

It is argued that "the constitutional right to vote" is unconstitutionally interfered with, if the legislature may restrict and hedge it about by denying to the elector entire freedom in the choice of his candidate.

It is not necessary in this case to determine whether the position of counsel is well taken, so far as an office created or continued by the Constitution, and thereby made elective, is concerned; though there are authorities which tend to show that, as a general principle, it is not. (See *The People* v. *Fisher*, 24 Wend., 215; *The People* v. *Snedaker*, 14 N. Y., 52; *Ex parte McCollum*, 1 Cow., 550.)

In *Barker* v. *The People* (3 Cowen, 686) it is expressly decided that the legislature may affix ineligibility to office as a punishment for crime and not encroach upon the constitutional privilege of the elector. This was placed upon the ground that it is a part of the legislative or sovereign power of the State to maintain social order, and to take life, liberty and all the rights of both when the sacrifice is necessary. For the common weal, the right of the criminal to receive the suffrage of the elector, and the right of the elector to give his suffrage to the criminal, may be taken away. And as social order may be preserved by the threatening of punishment for its

infraction, so it may be preserved by preventive laws, rendering its infraction impossible. Thus in the case in hand, it was perceived that it was incompatible, for an officer, who as superintendent of the poor was the temporary custodian and the almoner of the public moneys, to sit as supervisor in audit of his own accounts, and so for the prevention of the disorders which might arise from this incompatibility if permitted to exist, it was within the legislative or sovereign power to guard against it by a limit, in the special case, upon the right to receive and the right to give a vote for the former office. Will not the same principle sustain the right to the exercise of the same power in any similar and fitting case, whatever the office may be?

But we are not here called upon to go so far.

The office of superintendent of the poor is of statutory origin (see Laws of 1822–3–4, p. 383; 1 R. S., p. 616, § 15), and was originally filled by appointment. It was not until 1847, and of course after the adoption of the Constitution, that the legislature made it an elective office (Laws of 1847, chap. 498, p. 740), so that there is no right bestowed by the Constitution upon the elector to choose by vote to that office. But there is a gift from the legislature to the elector so to do, or rather a power thereto intrusted to him by statute, which may be taken back again. Now, the authority which confers a power, and may take it away, may, in bestowing it, limit and restrict its exercise as it sees fit, so far as it is not specially prohibited therefrom; and may within that limit say for how long, in what manner and upon what objects it shall be exerted. Certainly, if the legislature may say to the voter, you shall not vote for any one for this office, but it shall be appointive; it may say you shall not vote for any one for this office who is not free from this disqualification which we now declare. And the power is reserved to the legislature to direct, whether by election or appointment shall be made the choice of all county officers, the mode of the choice of whom is not provided for by the Constitution. (Const., art. 10, § 2.) The legislature may not put upon any elector a per-

sonal restriction from voting for any officer who may be elective, or whom it may declare elective, save such restriction as is imposed by the Constitution, for from that it is especially prohibited. But it may, in the exercise of its judgment for the public good, limit the number from whom the elector may select, for thus to legislate is within the general and sovereign power of legislation, which it constitutionally possesses.

2d. That the statute impairs a constitutional right of every elector to be chosen to any office, as seems to be claimed. The statute does not of its own force take away from Clute the right to be voted for to the office of superintendent of the poor. It needed, before it so operated, that he should have made his choice, and should have acted upon it. The law of itself did not affect him until of his volition he took the office of supervisor. As a general rule, any one may waive a personal right, be it constitutional or statutory, and may relinquish one advantage to secure another in his view as great. And it was when Clute became supervisor that he brought himself within the restriction of the act of 1853. He was not bound to become a supervisor, and if he had not, no question could have been made of his eligibility for superintendent. And if it be said that he had an equal right to seek either office or both, it is answered, that public office is not created for the benefit of the individual, but for that of the whole people. So long as the convenience and advantage of the people is the object sought and attained in legislation in regard to the qualifications for statutory offices, it cannot be said that the rights of any individual are unduly affected.

We are, therefore, of the opinion that the defendant Clute was not, at the general election in 1871, eligible to the office of superintendent of the poor of the county of Schenectady.

The second question to be considered is whether Furman, the relator, was, at the general election of 1871, duly elected to the office. Neither a majority nor a plurality of all the ballots found in the boxes were for him. He had but a minority of them.

It is the theory and the general practice of our government that the candidate who has but a minority of the legal votes cast does not become a duly elected officer. But it is also the theory and practice of our government, that a minority of the whole body of qualified electors may elect to an office, when a majority of that body refuse or decline to vote for any one for that office. Those of them who are absent from the polls, in theory and practical result are assumed to assent to the action of those who go to the polls; and those who go to the polls, and who do not vote for any candidate for an office, are bound by the result of the action of those who do; and those who go to the polls and who vote for a person for an office, if for any valid reason their votes are as if no votes, they also are bound by the result of the action of those whose votes are valid and of effect. As if, in voting for an office to which one only can be elected, two are voted for, and their names appear together on the ballot, the ballot so far is lost. The votes are as if for a dead man or for no man. They are thrown away; and those who cast them are to be held as intending to throw them away, and not to vote for any person capable of the office. And then he who receives the highest number of earnest valid ballots, is the one chosen to the office.

We may go a step further. They who, knowing that a person is ineligible to office by reason of any disqualification, persistently give their ballots for him, do throw away their votes, and are to be held as meaning not to vote for any one for that office. But when shall it be said that an elector so knows of a disqualification rendering ineligible the person, and knowing, persistently casts for him his ballot? There may be notice of the disqualifying fact, and of the legal effect of it, given so directly to the voter, as that he shall be charged with actual knowledge of the disqualification.

There may be a disqualifying fact so patent or notorious, as that knowledge in the elector of the ineligibility may be presumed as matter of law. In modern times Lord DENMAN, C. J., thus puts a case: "No one can doubt that if an elector

would nominate and vote only for a woman to fill the office of mayor, or burgess in parliament, his vote would be thrown away; there the fact would be notorious, and every man would be presumed to know the law upon that fact." (*Gosling* v. *Veley*, 7 Ad. & Ell., N. R., 406–439; 53 Eng. Com. Law, 406.) In the same case, the learned judge says that "the result of the decisions appears to be this: where a majority of electors vote for a disqualified person, in ignorance of the fact of disqualification, the election may be void or voidable, or, in the latter case, be capable of being made good according to the nature of the disqualification. The objection may require ulterior proceedings to be taken before some competent tribunal, in order to be made available; or it may be such as to place the elected candidate on the same footing as if he never had existed, and the votes for him were a nullity." And then, referring doubtless to the *viva voce* manner of voting in England, and to the manner of keeping of poll-books there, and to the fact of the number of electors there being small, so that for whom each elector has voted is known, and he may be safely allowed to recall his vote for an ineligible person, and give it for another eligible, the learned judge continues: "But in no such case are the electors who vote for him deprived of their vote if the fact becomes known and is declared while the election is still incomplete. They may instantly proceed to another nomination and vote for another candidate. If it be disclosed afterward, the party elected may be ousted and the election declared void; but the candidate in the minority will not be deemed *ipso facto* elected. But where an elector, before voting, receives due notice that a particular candidate is disqualified, and yet will do nothing but tender his vote for him, he must be taken voluntarily to abstain from exercising his franchises."

To which we add, that not only must the fact which disqualifies be known, but also the rule or enactment of law which makes the fact thus effectual.

In the multitude of cases in which the question has arisen, we think that up to this point, there is no essential difference

of result. All agree that there must be prior notice to, or knowledge in the elector of fact and law, to make his vote so ineffectual as that it is thrown away. But some say that if there be a public law, declaratory that the existence of a certain fact creates ineligibility in the candidate, the elector having notice of the fact, is conclusively presumed in law to have knowledge of the legal rule, and to be deemed to have voted in persistent disregard of it. Others deny that the maxim, "*Ignorantia juris excuset neminem*" (even with the clause of it, "*quod quisque scire tenetur*," not often quoted, and of which we are reminded by the very thorough brief of the learned counsel for the relator), can be carried to that length, and insist that there does not apply to this question the rule that all citizens must be held to know the general laws of the land, and the special law affecting their own locality.

That maxim, in its proper application, goes to the length of denying to the offender against the criminal law a justification in his ignorance thereof; or to one liable for a breach of contract, or for civil tort, the excuse that he did not know of the rule which fixes his liability. It finds its proper application when it says to the elector, who, ignorant of the law which disqualifies, has voted for a candidate ineligible, your ignorance will not excuse you and save your vote; the law must stand, and your vote in conflict with it must be lost to you. But it does not have a proper application when it is carried further, and charges upon the elector such a presumption of knowledge of fact and of law as finds him full of the intent to vote in the face of knowledge, and to so persist, in casting his vote for one for whom he knows that it cannot be counted, as to manifest a purpose to waste it. The maxim itself concedes that there may be a lack of actual knowledge of the law. For it is *ignorance* of it which shall not excuse. Then the knowledge of the law, to which each one is held, is a theoretical knowledge; and the doctrine urged upon us would carry a theoretical knowledge of the statute further than goes the statute itself. The statute but makes ineffectual

to elect the votes given for one disqualified. The doctrine would make knowledge not actual, of that statute thus limited, waste the votes of the majority, and bring about the choice to office by the votes of a minority. We are not cited to nor do we find any decision to that extent of any court in this State. The industrious research of the learned counsel for the relator has found some from courts in sister States. *Gulick* v. *New* (14 Ind., 97) is to that effect. *Carson* v. *McPhetridge* (15 id., 331) follows the last cited case. *Hatcheson* v. *Tilden* (4 Har. & McH., 279) was a case at Nisi Prius, and is to that effect. With respect for these authorities, we are obliged to say that they are not sustained by reasoning which draws with it our judgment. *Commonwealth* v. *Read* (2 Ashmead, 261) is also cited. But that was a case of a board of twenty, assembling in a room to elect a county treasurer. On motion being made to elect *viva voce*, a protest was made that the law under which they were acting prescribed a vote by ballot. Thus *actual notice* of law and fact was brought directly to each elector before voting. Nineteen persisted in voting *viva voce*. These were held to be wasted votes. One voted by ballot; and his vote was held to prevail, and the person he voted for to be elected. *Commonwealth* v. *Cluley* (56 Penn. St. Rep., 270) is also cited. But the language of the court there is: "The votes cast at an election for a person who is disqualified from holding an office are not nullities. They cannot be rejected by the inspectors, or thrown out of the count by the return judges. The disqualified person is a person still, and every vote thrown for him is formal." And that was the case of one who was ineligible by reason of having held the office of sheriff of a county, and became a candidate in the same county for the same office before the lapse of time prescribed by the Constitution; a case in its facts quite like this in hand.

The relator also cites many instances of the action of legislative bodies and their committees. As to these, a respectable authority on these questions has remarked, "that they cannot be said to afford any precise or useful principle"

(1 Peckwell, 500); and learned counsel, arguing in support of the principle now claimed by the relator, has conceded that "no fixed principle is established by the decision of committees" (*Galway Election Cases*, 2 Moak Eng. Cases, 714); and it may safely be said that they are not so conclusive and satisfactory as judicial determinations, as it is difficult to arrive at the exact principle upon which the votes of so many as constitute a legislative body are put. Besides that, they are not uniform, but quite diverse in their results, as appears from the citations of the counsel of the relator, and the instances noted in 56 Penn. St. Rep. (*supra*).

We have consulted many of the authorities cited to us from the English books; and in them it will be found, we think, that where it was held that votes for an ineligible person would be treated as thrown away, it was not extended beyond cases in which there was actual notice of fact and of law to the voters before their votes were cast. (*Gosling* v. *Veley*, *supra*; *Rex* v. *Hawkins*, 10 East., 211; *Claridge* v. *Evelyn*, 5 Barn. & Ald., 81; Douglass, 398 *n.* [22]; *Rex* v. *Parry*, 14 East., 549; *Rex* v. *Bridge*, 1 Maule & Selw., 76.)

And there are American authorities which hold that if a majority of those voting by mistake of law or fact happen to cast their votes upon an ineligible candidate, it by no means follows that the next to him in poll shall receive the office. (*Saunders* v. *Haynes*, 13 Cal., 145; *State* v. *Giles*, 1 Chand. [Wis.], 112; *State* v. *Smith*, 14 Wis., 497.) And in Dillon on Mun. Corp. (p. 176, § 135) it is stated that unless the votes for an ineligible person are expressly declared to be void, the effect of such person receiving a majority of the votes cast is, according to the weight of American authority and the reason of the matter (in view of our mode of election, without previous binding nominations, by secret ballot, leaving each elector to vote for whomsoever he pleases), that a new election must be had, and not to give the office to the qualified person having the next highest number of votes. And this view is sustained by a preponderance of the authorities cited by the author in the foot note, some of which are cited above.

And in *The Queen* v. *Mayor, etc.* (3 Law Rep. [Q. B.], 629), after holding that though the electors had actual notice of the fact which had been adjudged by the courts to disqualify, yet knowledge or notice in the elector of the adjudication could not be presumed. It is further said: "It is not enough to show that the voter knew the fact only; but it is necessary to show sufficient to raise a reasonable inference that he knew that the fact amounted to a disqualification. It cannot be said in all cases that the mere knowledge of a fact, which in law disqualifies a candidate, must be taken to be knowledge of all the accompanying circumstances."

We think that the rule is this: the existence of the fact which disqualifies, and of the law which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector, as that to give his vote therewith indicates an intent to waste it. The knowledge must be such, or the notice brought so home, as to imply a willfulness in acting, when action is in opposition to the natural impulse to save the vote and make it effectual. He must act so in defiance of both the law and the fact, and so in opposition to his own better knowledge, that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied.

To state a truism; our theory of government by the people is upon the assumption that the people as a whole, are intelligent of their rights and interests, and are honestly and earnestly concerned in the due and wise administration of affairs, and zealously alive to the need of good and fitting men in the various places of public trust, and hold in high esteem the privilege of suffrage, and are unready to pretermit its exercise or to exercise it meaninglessly. It is much to presume, with this as our starting point, that any considerable body of electors will purposely so exercise their right of electing to office as that it shall be but an empty form; and that going through with outward signs of an election they will of intent so cast their ballots, as that they will be votes wasted.

Now the finding in this case is, that there was no proof of actual notice of Clute's ineligibility, nor of any facts from which notice could be implied, save that he was a supervisor.

There was but this fact, and the law upon the statute book; sufficient in themselves, as we hold, to render him ineligible.

But therefrom to give the office to the relator, it is first to be presumed, as a matter of law, that near 300 of those who voted for Clute had knowledge of the fact that he was supervisor; had knowledge of the existence of the act of 1853; and knew that the fact and the law, concurring thus, he was ineligible to receive and avail himself of their votes in his favor, and knew that their votes given to him were wasted, without effect upon the count.

It is to be presumed further, that knowing this, they all, though seemingly desirous of taking an effectual participation in the choice of a person to the office of superintendent, deliberately so acted as that they are assumed to have persisted against knowledge; determined to "do nothing but tender their vote for him."

It is not in accordance with common sense, and we find no rule or authority so stringent as to compel us to that result.

There is one other question remaining. The act of 1829 says that no supervisor shall be appointed *to hold* the office, etc.; and the act of 1853 says that no supervisor shall be elected or appointed *to hold* the office, etc.

The learned and ingenious counsel for the defendant urges that the manifest intention of the legislature was to inhibit, not the *election* or appointment to the office of superintendent, but the *holding* of the two offices by the same person. And from this he deduces the proposition that when Clute accepted the office of superintendent he vacated that of supervisor, and could continue to hold the former.

We do not so think. The legislature intended that the same person should not hold the two offices at the same time; and to effect this, it prohibited the election of a supervisor to hold the office of superintendent. It made him ineligible, not merely to holding, but to an appointment or election to hold.

Statement of case.

The language is not that he shall not hold, but that he shall not be elected or appointed to hold, and operates upon the very first step in the process toward holding, and stops that. He can never hold but by appointment or election; and the act says that he shall not be eligible to that election or appointment. So that he never can begin to hold, and cannot, by resigning the one or accepting the other, bring himself within the reason of the cases cited, of which *The People* v. *Carrique* (2 Hill, 93) is one. There the defendant was held to be eligible to the office which he accepted; but as that was held to be incompatible with the one which he already filled, his acceptance of the last *ipso facto* vacated the first.

We are therefore of the opinion that the judgment of the General Term should be reversed, and that of the Special Term affirmed.

All concur.

Judgment accordingly.

ALFRED S. HUBBELL, Assignee, etc., et al., Appellants, *v.* HIRAM SIBLEY, Respondent.

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The provisions of the Code limiting the time for the commencement of actions for the recovery of the possession of real property (Code, § 78), and that within which a cause of action or defence founded upon a title to real property may be maintained or interposed (§ 79), apply only to those actions where the remedies sought were prior to the Code administered by courts of law. They have no reference to actions where the desired remedies were administered exclusively by courts of equity.

An action by a mortgagor against a mortgagee in possession for an accounting, and for the recovery of possession of the mortgaged premises upon payment of what shall be found due, seeks a purely equitable remedy, and comes within the provision of section 97 of the Code limiting the time for the commencement of actions not otherwise specified to ten years. The cause of action accrues at the time of entry of the mortgage under claim of title, and the statute then begins.

(Argued December 4, 1872; decided December 10, 1872.)

Statement of case

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of defendant, entered upon the report of a referee. (Reported below, 5 Lans., 51.)

This action was brought for an accounting to ascertain amount due upon certain mortgages covering certain lands, of which plaintiffs claimed to own the undivided one-half, and of which defendant was in possession, claiming title under a foreclosure sale, which plaintiffs alleged to be defective and invalid. He also asked leave to redeem, and upon payment of the amount found due to recover possession of said moiety. Defendant, among other things, pleaded the statute of limitations.

In December, 1846, James W. Sawyer and Alfred Hubbell, being the owners and in possession of two tracts of land situate in the city of Rochester, executed a mortgage thereon to defendant to secure $7,000. They laid out a portion into city lots, and in 1848 mortgaged ten of the lots to the Rochester Savings Bank, which by agreement with defendant was made the first lien. A number of other lots they sold and conveyed; others they contracted.

In January, 1849, Hubbell executed an assignment for the benefit of creditors.

In February, 1849, defendant commenced a foreclosure of his mortgage by advertisement. On the 24th May, 1849, the premises, excepting the lots conveyed or contracted, were sold as one parcel, subject to the mortgage to the Savings Bank, and were bid off by defendant, who entered immediately into possession. On the 6th January, 1854, the assignees of Alfred Hubbell quitclaimed their interest in the premises to plaintiff, Alrick Hubbell. He was also the owner of ten judgments recovered against Alfred Hubbell in 1848 and 1849. Alfred Hubbell died in 1853 intestate. His heirs quitclaimed to Alrick Hubbell. In March, 1863, plaintiff, Alfred S. Hubbell, was substituted as assignee in place of the original assignees. Upon these facts the referee directed a dismissal of the complaint, and judgment was entered accordingly.

Opinion of the Court, per GROVER, J.

Francis Kernan for the appellants. In a statute foreclosure the mortgagee must comply strictly with the provisions of the statute to render the sale effective. (3 R. S., 5th ed., 859, etc., §§ 1, 8; *Jackson* v. *Clarke*, 7 J. R., 217; *Jenks* v. *Alexander*, 11 Paige, 618; *Van Slyke* v. *Shelden*, 9 Barb., 278, 285; *Cohoes Co.* v. *Goss*, 13 id., 137, 144; *Cole* v. *Moffit*, 20 id., 18, 20; *King* v. *Duntz*, 11 id., 191; *St. John* v. *Bumpstead*, 17 id., 100.) Section 79 of the Code does not apply to this action. (Code, § 73, etc.; 2 R. S., 3d ed., 399, § 52.) This action could not be barred by less than twenty years possession by the mortgagee. (4 Kent's Com., 11 ed., 169, note 4; *Edwards* v. *Farmers' Ins. Co.*, 21 Wend., 467; S. C. in error, 26 id., 541; *Arnott* v. *Post*, 6 Hill, 65; *Kortright* v. *Cady*, 21 N. Y., 343; 2 R. S., 3d ed., 391, § 5; 21 Wend., *supra*, 467; 26 id, *supra*, 541; 6 Hill, *supra*, 65; id., 398, 399, §§ 49, 52; 4 Kent's Com., 11 ed., 213, note 1.)

W. F. Cogswell for the respondent. This action is barred by the statute of limitations. (*Bergen* v. *Bennett*, 1 Caines' Cas. in Error, 1, 19; *Demarest* v. *Wynkoop*, 3 J. C. R., 129, 145; *Mohawk Bank* v. *Atwater*, 2 Paige, 54, 60, 61; Hill on Trustees, 168, 169, marginal paging and notes; Code, § 97; *De Pierres* v. *Thorn*, 4 Bosw., 266, 268.)

GROVER, J. The statute of limitations is one of the defences set up by the answer and relied upon by the defendant. If this is valid, it will be unnecessary to examine the others, as this will dispose of the case. The same question was examined by this court during this session, in *Miner* v. *Beekman*,* and in the opinion it was held that the facts brought the case within sec. 97 of the Code, and that, therefore, the action was barred in ten years after it accrued, but as the same judgment must have been given, whether this was so or not, and as the question is important, it was again argued in the present case and must now be finally determined. The provisions of the Revised Statutes respecting the times of commencing actions were repealed by section 73 of the Code, and those of the Code

* (See ante, p. 337.)

substituted therefor, but the construction of the latter will be much aided by reference to the former, as in many provisions the similarity of the language used shows that it was not intended to change the law. Section 5, vol. 2, R. S., 293, provides that no action for the recovery of any lands, etc., or the possession thereof, shall be maintained unless the plaintiff, etc., was seized or possessed of the premises in question within twenty years before the commencement of such action. Section 78 of the Code provides that no action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appears that the plaintiff, etc., was seized or possessed of the premises in question within twenty years before the commencement of such action. It is entirely clear that this provision of the Code was intended to embrace the cases, and those only, which were included in section 5 of the Revised Statutes, and it is equally clear that the latter included legal actions only for the recovery of land or its possession, with or without damages for withholding it, and had no relation to any remedy administered only by courts of equity. Section 6 of the Revised Statutes provides that no avowry or cognizance of title to real estate or to any rents or services shall be valid unless it appears that the person making the avowry or the person, etc., was seized or possessed of the premises in question within twenty years before the committing of the act in defence of which such avowry or cognizance is made. Section 79 of the Code provides that no cause of action or defence to an action founded upon the title to real property, or to rents or services out of the same, shall be effectual unless it appears that the person prosecuting the action or making the defense or under whose title the action is prosecuted or defense is made, etc., was seized or possessed of the premises in question within twenty years before the committing of the act in respect to which such action is prosecuted or defense is made. It is evident that this section of the Code includes the cases only provided for by section 6 of the Revised Statutes, and that these were legal actions where remedies administered by courts of law only were sought.

But it is insisted that, conceding this to be so under the Revised Statutes, it is so no longer, for the reason that the distinction between actions at law and suits in equity then existing, has been abolished. (Code, § 69.) It is true that all distinctions in the forms of action have been abolished, but all the remedies administered by both courts have been preserved, and where language is used in a statute showing that the design was to include one class of remedies only, its construction must be confined to that class. Sections 78 and 79 of the Code must be held to embrace actions only where the only remedy sought was formerly obtained in legal actions.

It is further insisted that this is an action for the recovery of real property. That since the Revised Statutes, assuming for the purposes of this question that the foreclosure under which the defendant entered was void, he never acquired any legal title to the land; although it is conceded that before that time he would have had such title. It is true that this is the language of the cases, which was true when applied to the cases in which it was used. All the change made by the Revised Statutes is found in section 58, vol. 2, 312. That section provides that no action of ejectment shall thereafter be maintained by a mortgagee or his assigns or representatives, for the recovery of the possession of the mortgaged premises. Before the enactment of this section, such action could be maintained after forfeiture by non-payment of the money when due, and it was then said, that after forfeiture, the legal title was in the mortgagee, for the reason that his title would prevail at law over that of the mortgagor. Since then, it is said that he has not the legal title, because it will not so prevail. But since the enactment of this section, a mortgagee in possession after forfeiture can defend his possession in ejectment brought by the mortgagor upon his mortgage. (*Phyfe* v. *Riley*, 15 Wend., 248; *Chase* v. *Peck*, 21 N. Y., 581.) It can under this rule hardly be said that such a mortgagee has no legal title, for it prevails at law over that of the mortgagor. While these facts continue, the latter must resort to equity for the recovery of his

land, which will be adjudged to him upon payment of what shall be found due upon the mortgage.

It is further insisted by the counsel for the appellants, that this should be held an action for the recovery of real property, for the reason that the plaintiffs might, before its commencement, have tendered the amount due, and thereby discharged the lien, and then commenced an action for the mere recovery of the possession of the land. It is a sufficient answer to this that this is not such an action, but an action for an accounting and the recovery of the possession upon payment of what shall be found due. This is a pure equitable remedy, and such as was given by courts of equity only, while such courts had a separate existence. By giving this answer, it is not intended to concede that such tender might have been made by the plaintiffs with the effect claimed by the counsel. That is a question not involved in the case, and it is not necessary to examine it. It is sufficient to say that no one of the cases cited by the counsel in its support, was that of a mortgagor against a mortgagee in possession where the amount due upon the mortgage was uncertain and could only be determined by an accounting. The question will be seasonably considered and determined when it shall necessarily arise. The relief sought in this action does not come within any of the other provisions fixing the time within which the action must be commenced. Hence, it must come within section 97. That limits the time to ten years. The defendant had been in possession for more than nineteen years before the commencement of the action, claiming to be the absolute owner, having purchased at a foreclosure sale under the statute, which he claimed to have been in all respects regular and valid. Under these facts, the cause of action accrued at the time of the entry, and the statute then commenced running; and as more than ten years have elapsed, the action is barred by the statute.

The judgment must be affirmed, with costs.

All concur.

Judgment affirmed.

Statement of case.

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THE OCEAN NATIONAL BANK OF THE CITY OF NEW YORK, Appellant, *v.* HAMILTON G. FANT, Respondent.

Defendant was sued as indorser upon a note containing a statement that the maker had deposited with the payee certain collaterals with authority to the latter to sell, without notice, in case of non-payment; these collaterals came to plaintiff's hands when it became holder of the note. When payment of the note was demanded of the maker he demanded of the notary presenting it a return of the collaterals, stating his readiness and willingness to pay upon production thereof, the notary did not have them. *Held*, that the demand and refusal were insufficient to charge the indorser; that to constitute a valid demand the collaterals should have been produced, or had in readiness to be surrendered upon payment.

(Submitted November 26, 1872; decided December 3, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of defendant entered upon the decision of the court at circuit upon trial without a jury.

This action was brought against defendant as indorser of a promissory note, of which the following is a copy:

"$3,352.61.

"NEW YORK, *October* 15, 1869.

"On demand I promise to pay to Hamilton G. Fant or order $3,352.61 for value received, with interest at the rate of seven per cent per annum, having deposited with him as collateral security, with authority to sell the same at the brokers' board, or at public or private sale, or otherwise at his option, on the non-performance of this promise and without notice, one land grant bond of the Union Pacific Railroad Company, eastern division, of the par value of $1,000, and four construction bonds, 'series B.' of the said Union Pacific Railroad Company, convertible into the land grant bonds of the same description as the one first named, and all of the par value of $1,000 each, said bonds being deposited with Ocean National Bank.

"JOS. B. STEWART."

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The court found that plaintiff, after it was indorsed and before its maturity, and for a valuable consideration, became the owner and holder of the note and of the securities mentioned therein.

That at the request of the plaintiff a notary public, on the fourth day of March, took said note, without the collaterals mentioned therein, to the maker thereof and requested him to pay it.

That the maker demanded the production of the collateral securities mentioned in the note, and informed the notary who presented it that he was ready and willing to pay upon the production of the collaterals, and the maker's refusal to pay was upon the sole ground that the collateral securities were not produced; that thereupon said notary protested the note in the usual form and gave defendant notice thereof.

That said collateral securities were never produced nor offered to be delivered to the maker of said note upon his payment of the same, nor otherwise.

That the maker of the note was entitled to have the collateral securities surrendered to him upon the payment of the note.

That to charge the defendant it was necessary for the plaintiff to produce to the maker of the note the collaterals and the note, and make demand of payment, and that defendant was entitled to judgment dismissing the complaint. Judgment was entered accordingly.

Dunning, *Edsall* and *Hart* for the appellant. The note in suit was simply a negotiable promissory note; its provisions respecting the collaterals did not change or modify its character. (Chitty on Bills, 55; *Cook* v. *Satterlee*, 6 Cow., 108; *Arnold* v. *Rock River Valley R. R. Co.*, 5 Duer, 214.) The demand was good without a tender of the collaterals. (*Bank of Rutland* v. *Woodruff*, 34 Vt. [5 Shaw], 89; *Hale* v. *Rider*, 5 Cushing, 231; *Lewis* v. *Mott*, 36 N. Y., 402; *Strong* v. *Blake*, 46 Barb., 228.)

Opinion of the Court, per RAPALLO, J.

E. Sprout for the respondent. The maker of the note, on the demand of payment, was entitled to have the collateral securities tendered to him. (Story on Prom. Notes, §§ 445, 253, 107; Edwards on Bills and Prom. Notes, 503, 504; *Smith* v. *Rockwell*, 2 Hill, 483; *Rowley* v. *Ball*, 3 Com., 303; *Handsaker* v. *Robinson*, 7 Barn. & Cress., 90; *Anderson* v. *Heath*, 4 Maule & Sel., 308; Chitty on Bills, 390, marginal paging.)

RAPALLO, J. The note upon which the defendant is sued, as indorser, contains a statement that the maker has deposited with the payee, as collateral security, certain railroad bonds, with authority to sell them without notice in case of non-payment of the note; and it is found as a fact that these collaterals came to the hands of the plaintiff when it became the holder of the note.

We think that the court below was clearly right in holding that an agreement to restore these collaterals to the maker, on payment of the note, is to be implied from the transaction as stated in the instrument itself, and that the acts should be simultaneous. The right of the maker to receive these collaterals when he should pay the note stood upon the same footing as his right to the surrender of the note itself; and, laying out of view special cases of lost notes, it is well settled that, to constitute a valid demand, the note must be produced, and ready to be surrendered on payment. (Story on Prom. Notes, §§ 445, 448, 107; *Smith* v. *Rockwell*, 2 Hill, 482; Edwards on Bills, 503, 504.)

It would be most unreasonable to require the maker to pay such a note in the absence of the collaterals, which frequently consist of negotiable securities, and to trust to his legal remedies against the holder to recover them.

It is found as a fact that, at the time payment of the note was demanded of the maker, he demanded of the notary presenting it a return of the collaterals, and stated that he was ready and willing to pay the note on production of the collaterals; but that the notary did not have them, and the

maker's refusal to pay was on the sole ground that the collaterals were not produced. Without any further demand, and without showing any tender or even the production of the collaterals, ready to be surrendered, the defendant was sued as indorser.

The case contains evidence sustaining the findings, and we think the conclusion was correct that the collaterals, not being produced or in readiness to be surrendered on payment of the note, and the refusal being on that ground alone, the demand and refusal proved were insufficient to charge the indorser.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

JOHN H. JONES, Executor, etc., Respondent, *v.* JOHN SHELDON, Appellant. 50 477 144 417

The provision of the act of 1867 amending the act to prevent animals from running at large upon the highways (Laws of 1867, chap. 814, § 2), which gives a remedy for injuries by cattle trespassing, applies only to cattle trespassing upon premises from the highway; it has no application to the case of a trespass by the cattle of one gaining access through a division fence to the lands of an adjoining owner.

Although the title is no part of a public act, yet it is of some force in showing the purpose of the act.

(Argued December 4, 1872; decided December 10, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of plaintiff entered upon the decision of the court at circuit upon trial without a jury.

This action was brought to recover damages for an alleged conversion of ten cows. Plaintiff's testator, William Whitmore and defendant were the owners of adjoining lands; ten cows belonging to Whitmore broke through the division fence and trespassed upon the lands of defendant, who seized them and caused them to be sold in proceedings conducted

according to the requirements of chapter 814, Laws of 1867. The court held that that act only applied to cases of trespass committed by animals at large in the highway or gaining access to private premises from the highway, and directed judgment for plaintiff. Judgment was entered accordingly.

J. B. Adams for the appellant. Chapter 814, Laws of 1867, applies to private trespasses by animals, without reference to their having been on the highway. (*Rockwell* v. *Nearing*, 35 N. Y., 302; *Fox* v. *Dunckel*, 46 id., 693; *Cook* v. *Gregg*, id., 439.)

Scott Lord for the respondent. Chapter 814, Laws of 1867, does not apply to the respondent's cattle, they not having entered appellant's inclosure from the highway. (*Shotwell* v. *Mali*, 38 Barb., 445; *Cowles* v. *Balzer*, 47 id., 562, 571; *Ward* v. *Whitney*, 8 N. Y., 446.)

PECKHAM, J. The question involved is whether the act amending the act "to prevent animals from running at large in the public highways," passed in 1867, provides a remedy for injuries by cattle, etc., escaping on to a lot through a division fence, and not from the highway.

In this case the cattle so escaped, and the party trespassed upon seized them under that statute, and they were sold. The owner brought an action for their seizure, and the defendant, after a general denial, set up their seizure, etc., under this act, alleging that they escaped on to his premises through a defect in a part of the division fence which this plaintiff was bound to make and maintain.

Upon the trial before Mr. Justice DWIGHT, he held that this remedy did not apply to such a case. This judgment was affirmed, and the defendant appealed.

The provision under which this question arises is as follows: "It shall be lawful for any person to seize, take into his custody, and retain till disposed of as required by law, any animal which may be in any public highway and opposite to land owned or occupied by him, contrary to the provisions

of the foregoing section, or of any animal which may be trespassing upon premises owned or occupied by him." (2 Laws of 1867, p. 2036, § 2.)

Although the title constitutes no part of a public act, yet its universal use by the legislature is of some force in showing the purpose of the act.

It is plain that the purpose of this act, as well as of the act amended and again amended in 1869, was to protect the public highways, streets and parks against the running at large of cattle and animals named. It imposes penalties upon owners for suffering it.

To make it more effectual for this purpose, the act of 1869 prohibits the herding or pasturing of cattle, etc., in the highways, and directs their seizure when "so found running at large or being herded or pastured." (1 Laws of 1869, p. 949, § 1.)

There is no provision in either act which seems to contemplate the seizure of animals for escaping through a division fence upon an adjoining owner. Nor is any provision made for trying the question as to the sufficiency of any division fence in the trial provided for in this act. On the contrary, it expressly provides for a trial of the right and grounds of any seizure, only by allowing the defendant or person appearing, "to deny, under oath, any or all the facts alleged in said complaint," and then "an issue shall be deemed joined in said proceeding, and the subsequent proceedings shall be as in civil actions," etc. (§ 3.)

In an action of trespass, *quare clausum fregit*, a defence that the animals escaped through a portion of the division fence which the plaintiff was bound to maintain, was necessary to be pleaded. This was so at common law, and I think it is so under the Code. (1 Chit. Pl., 534, 622, 636.)

If this act be construed as applying only to seizures of cattle trespassing on premises from the highway, then such a plea seems sufficient. No question as to the sufficiency of a fence can arise then, as no fence against animals so running at large is necessary.

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It is difficult to conceive of any defence that would not be admissible under this answer, if the act be confined to escapes from the highway.

There are now full and adequate provisions in the Revised Statutes for trying all questions as to the sufficiency of division fences, and for all litigation growing thereout.

That the legislature should subject trespasses by animals from the highway to the provisions of this act, is in harmony with its purpose as declared by its title, and it does the better protect the highway from the unlawful invasion of animals. Whereas, trespasses through division fences have no connection with the purpose of the act.

In *Shepherd* v. *Hess* (12 J. R., 433) a town passed a by-law, that "all hogs shall be kept up." This the court held had only application to a trespass done through an outer fence adjoining a highway or common; not to an inner or partition fence between two neighbors.

In our view, this statute has no application to trespasses through division fences between neighbors, but only to those committed from the road. The former, we think, are without the scope and purpose of the act.

The judgment should be affirmed.

All concur except ALLEN, J., not voting.

Judgment affirmed.

WALTER S. HUBBELL, Appellant, *v.* CHARLES A. MEIGS et al., Respondents.

Where a judgment in an action tried by the court or a referee is reversed by the General Term and new trial ordered upon questions of fact, the General Term is not required to specify, in its order, the particular errors of fact to authorize a review in this court; it is sufficient if the order states generally that the reversal was based wholly, or in part, upon errors of fact.

The General Term has not only authority but it is its duty, where the facts established require it, to reverse a judgment as to one or more of several joint defendants, and affirm it as to others.

Fraud is not established by proving the falsity of statements which were simply expressions of opinion and belief founded upon information

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derived from others. The party alleging fraud must show, in addition, that he who made the statements knew them to be false at the time of making them.

Where one, with intent to cheat and defraud another, induces him by fraudulent means and representations to purchase stocks for value which he knows to be worthless, he is liable for the damages sustained, whether the purchase is made from him or another.

The measure of damages in such case is the difference in value of the stock, as the condition of the company issuing it really was, and as the purchaser was fraudulently induced to believe it was. The market price of the stock about the time or soon after the purchase, is strong evidence of its value, and in the absence of other proof will control. But where the real pecuniary condition of the company is shown, from which it appears the stocks were worthless, such market price is entitled to no weight upon the question of value. The purchaser, after discovery of its worthlessness, is not bound to mitigate the loss of him by whose fraud he was induced to purchase, by himself cheating some ignorant purchaser.

As between stockholders, the books of a corporation and sworn copies thereof are competent evidence to show the acts of the corporation.

(Argued December 6, 1872; decided December 17, 1872.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, reversing a judgment in favor of plaintiff entered upon the report of a referee. The order stated the reversal was for errors, both of law and fact.

The action was brought to recover the amount paid by plaintiff for 200 shares of the La Crosse and Milwaukie Railroad Company. The first count of the complaint set forth an alleged conspiracy between defendants to sell the stock, knowing it to be worthless, and to cheat and defraud purchasers, and a sale to plaintiff, induced by false and fraudulent representations, upon their part, made in pursuance of such combination. It further alleges an offer to return the stock upon discovery of the fraud, and a demand of the money paid therefor. The second count was for money had and received.

The facts established, which are pertinent to the questions discussed, appear in the opinion. Upon the trial the referee admitted evidence of statements and declarations of defendant, Alden, to plaintiff in the absence of the other defendants.

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He also admitted sworn copies of the books of the La Crosse and Milwaukie Railroad Company.

The referee directed judgment against all the defendants for the amount paid by plaintiff for the stock, with interest, deducting two dividends received by him.

H. R. Selden and *John Ganson* for the appellant. Defendants are responsible for the fraudulent statements made by them, whether they knew them to be false or not. (*Bennett* v. *Judson*, 21 N. Y., 238; *Craig* v. *Ward*, 36 Barb., 378; *Marsh* v. *Falker*, 40 N. Y., 569; *Wall* v. *Stubbs*, 1 Maddock, 80; Am. ed., 55, and note *k*; *Cadman* v. *Homer*, 18 Ves., 10; *Sibbald* v. *Hill*, 2 Dow's H. of L. Cases, 264; *Medbury* v. *Watson*, 6 Metcalf, 246, 260; *Walker* v. *Symonds*, 3 Meriv., 73; *Zabriskie* v. *Smith*, 3 Kern., 331,; per DENIO, J., per Lord KENYON, C. J., in *Eyre* v. *Durnsford*, 1 East., 328; and see id., 330, Day's ed., note 1; *Gough* v. *St. John*, 16 Wend., 646, 651; *Eyre* v. *Durnsford*, *supra*; *Allen* v. *Addington*, id.; *Hubbard* v. *Briggs*, 31 N. Y., 529; *Medbury* v. *Watson*, 6 Metcalf, 246, 259, 260; *Paisley* v. *Freeman*, 3 T. R., 44; *Bostock* v. *Jardine*, 3 Hurlston & Coltman [Exch. R.], 700; *Conkey* v. *Bond*, 36 N. Y., 427; *Bennett* v. *Judson*, 21 id., 238; *Marsh* v. *Falker*, 40 id., 562, 566.) The fact of conspiring need not be proved. (*People* v. *Mather*, 4 Wend., 230, 261; *Gardiner* v. *Preston*, 2 Day, 208, 209; *Rex* v. *Cope*, 1 Str., 144; *King* v. *Parsons*, 1 Wm. Bl., 392, and note *o*, 2d ed.; *Regina* v. *Murphy*, 8 C. & P. [34 E. C. L.], 297; *Rex* v. *Pollman*, 2 Camp., 233; *Jones* v. *Baker*, 7 Cow., 445; 1 Greenleaf on Ev., § 111; 3 id., § 94; *Amer. F. Co.* v. *U. S.*, 2 Pet., 358, 365; *Rex* v. *Stone*, 6 T. R., 527; *Tappan* v. *Powers*, 2 Hall, 277, 297.) The finding of the referee, as to the fraudulent combination and joint liability of defendants, is conclusive on those questions. (*Baker* v. *Spencer*, 58 Barb., 248; *Sheldon* v. *Sherman*, 42 N. Y., 489, 490; *Grant* v. *Morse*, 22 id., 323, 324, 325; *Carman* v. *Pultz*, 21 id., 547, 551, 552; *Murphy* v. *Brace*, 23 Barb., 561, 565; *Watson* v. *Campbell*, 28 id., 421, 424; *Roberts* v. *Carter*, id., 462, 465;

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Lefler v. *Field*, 50 id., 407, 413; *Milburn* v. *Belloni*, 39 N. Y., 54; *Smith* v. *Coe*, 29 id., 669, 670; *Ashley* v. *Marshall*, id., 494, 501; *Sinclair* v. *Tallmadge*, 35 Barb., 603; *Tomlinson* v. *The Mayor, etc.*, 44 N. Y., 605; *Brainard* v. *Dunning*, 30 id., 211, 216; *Chubbuck* v. *Vernam*, 42 N. Y., 435; *Fellows* v. *Northrup*, 39 id., 117.) The General Term is authorized, when the facts established require it, to reverse a judgment as to one or more of several joint debtors, and affirm it as to others. (Code, §§ 12, 136, 274, 330; *Seeley* v. *Chittenden*, 4 How. Pr., 265; *Beal* v. *Finch*, 11 N. Y., 143, 144, per DENIO, J.; *McIntosh* v. *Ensign*, 28 id., 169; *Skinner* v. *Gunton et al.*, 1 Saund., 230, note 4; *Jones* v. *Baker*. 7 Cow., 445, 449; *Hutchins* v. *Hutchins*, 7 Hill, 104.) The copies of portions of the corporation books were properly received in evidence. (2 Phil. Ev., Edward's ed., 295, note 343; Ang. & Ames on Corp., 3d ed., 607; *Gery* v. *Hopkins*, 7 Mod., 129; *Rex* v. *Smith*, 1 Str., 126; *Brocas* v. *Mayor, etc., of London*, id., 307; *Warriner* v. *Giles*, 2 id., 954; *Mayor of Lynn* v. *Denton*, 1 T. R., 689; *Corp. of Barnstable* v. *Lathey*, 3 id., 303; *Wood* v. *Jeff. Co. Bank*, 9 Cow., 194, 205; *The State* v. *Buchanan*, 1 Wright, 233; *F. and M. Bank* v. *Boraef*, 1 Rawle, 152; *Motteram* v. *Eastern Counties Railway Co.*, 7 C. B. [97 C. L.], 58, 71; 1 Greenleaf on Ev., § 142; *Atkyns* v. *Hatton*, 2 Anstr., 387; *Miller* v. *Foster*, in note there; *Armstrong* v. *Hewitt*, 4 Price, 216; *Auriol* v. *Smith*, 18 Ves., 198–205, 206; *Mortimer* v. *McCallum*, 6 M. & W., 67, per ABINGER, Ch. B.; 72 per ALDERSON, B.; 1 Starkie on Ev., 158, 2d Am. ed.; *Adamthwayte* v. *Synge*, 1 Starkie, 183; S. C., 2 Eng. Com. Law, 348; 1 Greenleaf on Ev., § 485; id., § 142.)

A. J. Parker and *John H. Reynolds* for the respondents. False representations, to be actionable, must have been known to be false by the party making them, or he must have assumed or intended to convey the impression he knew they were true. (40 N. Y., 562; id., 575, in note; 45 id., 169, 175; *Spiegelmeyer* v. *Crawford*, 6 Paige, 254; *Young*

v. *Covell*, 8 John., 19; *Lord* v. *Goddard*, 13 How. [U. S.], 211; *The U. S. Trust Co.* v. *Harris*, 2 Bosw., 88; *Wilson* v. *Fuller*, 3 Adol. & Ellis [N. S.], 68; *Taylor* v. *Fleet*, 4 Barb., 95; *Clark* v. *Baird*, 7 id., 64.) Copies of the books of the corporation were improperly admitted in evidence. (1 Starkie on Ev., part 2, § 120, pp. 298, 299, note 1; 1 Phillips on Ev., 422, and note 800, in 3d vol., 1156, 1157; *Highland Turnpike Co.* v. *McKean*, 10 John., 154; *Jackson* v. *Walsh*, 3 id., 226; 1 Phillips on Ev., 422.) The referee erred in admitting evidence as against Meigs and Greenleaf of the acts, statements and representations of Alden, not made in their presence. (1 Greenleaf Ev., §§ 111, 174, 177; *Cuyler* v. *McCartney*, 40 N. Y., 222, 229.)

GROVER, J. The order appealed from shows that the judgment entered upon the report of the referee was reversed, and new trial ordered for errors, both of law and fact, but does not specify any particular finding of fact by the referee as erroneous. The counsel for the appellant insists that, from this omission, this court has no power to review any of the findings of fact by the referee. That to authorize this, the order must specify such findings as are held erroneous; and the review by this court is confined to those thus specified. This position cannot be sustained. The Code (§ 348) gives an appeal from judgments, both upon the law and the fact, when the trial is by the court or a referee. Upon such an appeal, it is the duty of the court to examine the case and determine whether any error, either of law or fact, to the prejudice of the appellant has been committed; and if so, award the appropriate redress. In this examination the court may assume that the referee found such facts, in addition to those contained in the report, as the evidence would have warranted, and were requisite to sustain his legal conclusions. Section 272 of the Code, among other things, provides, that if the judgment be reversed by the General Term, and a new trial ordered, it shall not be deemed to have been reversed on questions of fact, unless so

stated in the judgment of reversal; and in that case, the question whether the judgment should have been reversed, either upon questions of fact or of law, shall be open to review in the Court of Appeals. It will be seen that the General Term is not required to specify the particular errors of fact; but simply to state, in the judgment of reversal, that it was based wholly or in part thereon, as was done in the present case. When this is done, it is the duty of this court to review both the facts and the law, in like manner as the General Term upon the appeal to it.

Although it was not expressly found by the referee that the defendants combined to defraud the plaintiff, by inducing him to purchase stock of the La Crosse and Milwaukie Railroad Company, which they knew to be worthless, I think his legal conclusions show that he did so find; and as his rulings upon the admissibility of the declarations of Alden, as evidence against Meigs & Greenleaf, can be sustained only upon that assumption, I will first consider that question. The testimony shows that Meigs & Greenleaf were brokers in the city of New York, and dealers, to a large extent, in the stock in question, purchasing and selling it on their own account and for their customers, and that they purchased from and sold more or less of it for Alden; but this has no tendency to show any combination between them in respect to their dealings with others in the stock.

The conversation had between the plaintiff and Alden at the Astor House, the evening preceding the day the former made the agreement with Meigs & Greenleaf for the purchase of the stock, and the further fact that Alden called at the office of Meigs & Greenleaf while the plaintiff was negotiating, may excite suspicion, but furnish no proof of any combination or conspiracy. Alden, in the conversation with the plaintiff, made no allusion to Greenleaf or Meigs as dealers in the stock or otherwise; and there was no proof that he had any expectation that the plaintiff would apply to them in particular to purchase the stock. The call of the plaintiff

upon Meigs & Greenleaf was induced solely by the fact that they had been his brokers in previous stock transactions; and the call of Alden by the fact that they were his brokers. It does not appear that anything was said about the purchase of the stock while Alden was there, or that he knew that that was the business of the plaintiff there. The circumstance that Alden knew, in the evening of that day, that the plaintiff had made the contract, is entitled to no weight. It is not even proved that he learned it from Meigs & Greenleaf; as it appears that the witness Zook had also the same information, which he got from the plaintiff's brother at the Astor House where Alden was also staying. Had it been proved that Meigs and Greenleaf told Alden of the purchase, it would not be evidence of any confederacy between them. It was further proved that Jerome, a broker, had, sometime before the purchase, applied to the board of brokers to have the stock of the company placed upon the list of stocks sold at the board, and that Greenleaf had been appointed upon a committee to examine and report upon the propriety of so doing. There was no proof as to what this committee did, or what they reported, or that Greenleaf did anything in that capacity. This furnished no evidence of any combination between Greenleaf, or his firm, and Alden to put the stock off fraudulently upon the plaintiff or the public generally. Had the latter been proved, the plaintiff could have maintained the action upon the ground that, where a conspiracy to defraud the public generally is entered into, the conspirators are liable to any individual injured thereby.

My conclusion is that the evidence was not sufficient to sustain a finding of a conspiracy between the respondents to defraud the plaintiff or the public generally by inducing him or them to purchase the stock of the company in question. The referee, therefore, erred in the finding, and also in receiving the declarations and acts of Alden as evidence against Meigs & Greenleaf. But it is claimed by the counsel for the appellant that, conceding this, they were not entitled to a reversal of the judgmen; as their liability was established by other facts, in the

absence of any conspiracy with Alden. These facts are, first, a failure of consideration for the money paid by the plaintiff to them as the purchase-price of the stock; and, second, that they were guilty of fraud in making the sale, upon the discovery of which the plaintiff elected to rescind the contract; and did so, by a tender to them of the stock and demanding from them the purchase-money.

It is also insisted that it was proved that they were guilty of fraud in the sale, and that the damages sustained by the plaintiff thereby were equal to the amount of the recovery, and that the plaintiff was entitled to recover such damages in the action. The counsel insist that the plaintiff could not recover damages for such fraud in this action, for the reason that the complaint does not set out any such cause of action, but is founded upon contract only. This objection does not appear to have been taken upon the trial before the referee, and, if it had, would not have been well founded. The complaint contains two causes of action. The first contains all the allegations necessary to entitle the plaintiff to recover of the defendants damages sustained from the fraud; and that such damages were at least equal to the money paid by him for the stock, together with further allegations showing a recision of the contract by him, concluding with a demand of judgment for the amount of such money. Under this the plaintiff, by proving the fraud and his damages, would have been entitled to recover, although entirely failing to prove a rescision of the contract. The first cause of action set out was, therefore, founded upon tort. The second was what, under the former ystem, would have been called *indebitatus* assumpsit for money had and received by the defendants for the use of the plaintiff; a cause of action then and now upon contract. These causes of action could not be joined. (Code, § 167.) But the objection was apparent upon the face of the complaint, and no demurrer was interposed. The objection was therefore waived. (Code, § 148.) The inquiry, then, is whether any fraud, in making the sale, was shown to have

been practiced by Meigs & Greenleaf. As to the former, it was not proved that he individually had any participation in negotiating the contract. But he was a partner with Greenleaf, and, as such, liable civilly for his frauds in the business of the partnership. The referee found, and the finding was sustained by the evidence, that Greenleaf, while negotiating the sale to the plaintiff, in answer to his question, told him that the governor had signed the bill giving the company a valuable grant of land, which would enable it to build its road; that the eastern division of the road was completed or nearly so, and was doing a large business; and the earnings of that division were large; and the stockholders of that division would receive large dividends from the earnings of the road; that the stock of the eastern division was full paid stock, and the holders of it would be entitled to dividends, and the stock had recently gone up in the market; that the plaintiff then told Greenleaf that if he bought he wanted stock of the eastern division, full paid stock. There was no proof that the governor had not signed the bill, nor but that it gave the company valuable land; nor but that the stock had risen in the market. The referee, as a legal conclusion, held that these statements were material, and were positive affirmations of the matters stated as upon his own knowledge; and having been relied and acted upon by the plaintiff, and being untrue in fact, entitled the plaintiff to recover of Meigs & Greenleaf the amount of loss and damage sustained by reason thereof. I think this conclusion unwarranted by the facts found, and that the evidence would not authorize the finding of any additional facts sustaining it. The statements made were by a broker in New York to his customer in relation to the affairs of a corporation in Wisconsin, in the stock of which he was dealing. Under these circumstances Greenleaf, in what he said, could not well have been understood as speaking from his own personal knowledge as to the value of the land granted to the company, or what it would enable the company to do, or as to the amount of business done upon that part of the road completed, or the profits derived there-

from. The statements were expressions of opinion and belief, founded upon information derived from others. So regarded, fraud was not established by merely proving their falsity. The plaintiff was required to show, in addition, that Greenleaf knew them to be false at the time he made them. (*Marsh* v. *Falker*, 40 N. Y., 562; *Meyer* v. *Amidon*, 45 id., 169; *Oberlander* v. *Spies*, id., 175.) No such proof was given. The plaintiff, therefore, failed in showing that Meigs and Greenleaf were guilty of any fraud in making the contract with him. This disposes of the question as to a rescission of the contract. There was no failure of consideration. It is unnecessary to determine whether the corporation was authorized by its charter to sell its stock at less than par, or whether, in so selling, its officers did not violate their duty. The plaintiff was a *bona fide* purchaser, and, being such, acquired a valid title to the stock transferred to him. There was no over issue of stock; and that in question having been sold by the proper officers of the corporation, it was estopped from showing its invalidity. (*The N. Y. and New Haven R. R. Co.* v. *Schuyler*, 34 N. Y., 30; *Rogers* v. *Burlington*, 3 Wallace, 654.) The stock delivered was the kind specified in the written contract. There was no proof that any stock, restricted to the eastern division of the road, had ever been issued. The plaintiff received from Meigs & Greenleaf exactly what he contracted for, and, they having been guilty of no fraud, he was not entitled to recover against them. The judgment against them was rightly reversed by the General Term, and a new trial granted; and as to them, the order must be affirmed, and judgment given in their favor upon the stipulation, with costs.

From the opinion, delivered at the General Term, it appears that doubt was entertained by that court as to the propriety of affirming the judgment as to a part of the defendants, and reversing it as to others. The law not only authorizes this, but it is the duty of the court so to do if such a judgment is required by the facts established. (Code, §§ 12, 274; *McIntosh* v. *Ensign*, 28 N. Y., 169; *Bullis* v. *Montgomery* and others, *ante*, p. 352,

decided at the present sitting of this court.) It therefore must be determined whether the judgment of the referee should have been reversed as to Alden. The only respect in which his case differs from that of Meigs & Greenleaf is as to the proof of fraud practiced by him to induce the plaintiff to purchase the stock. It was found by the referee, and the finding is fully supported by the evidence, that Alden, shortly previous to the purchase by the plaintiff, stated to him that he had been connected with the company in question for a long time, and knew all about the affairs of the company; and that the land granted to the company (or the land grant) would build and complete the road of the company; that stock to the amount of only about $1,000,000 had been issued by the company, and not more than $2,000,000 of stock in all would be necessary; that there was but a small amount of stock upon the market, and that he did not know of more than two or three hundred shares for sale; that the stock could not be had for the price it was then selling at for a very long time; that then was the time to buy the stock if the plaintiff wanted it; that the stock would go up to par by the first of January ensuing; that the eastern division of the road was nearly completed; that the earnings were large, and a dividend would be paid therefrom in cash the next January; that the stock of the eastern division was nearly all full paid; that the directors were competent and honest, and managed its affairs well; that its affairs were in a prosperous condition; that the consolidation with the Watertown road was a good arrangement for the company. The referee further found, upon sufficient proof, that all these statements, except his connection with the company, were false, and, although it is not expressly so found, the proof was that he knew them to be false at the time; that he knew that there was but very little full paid stock (that is, stock for which the company had received par); that the company had disposed of large amounts of it to contractors much below par; that it was sent to New York by the company and sold on its account at a large discount, and that large quantities were then upon

the market; in short, that the company was bankrupt, and its stock worthless. It was found by the referee that the plaintiff relied upon these statements, and was induced thereby to purchase the stock; and the proof is clear that the statements were made by Alden for that purpose. This appears from the fact that he was a large stockholder, and otherwise interested; and by the proof that he, about that time, made similar false statements to others to induce them to purchase the stock of the company. In short, the evidence would have warranted a finding that Alden was engaged in putting off upon the public the stock of a company known by him to be bankrupt by falsely representing it to be valuable and intrinsically worth par. The legal conclusion of the referee, that this made him liable to the plaintiff for the damages sustained by the plaintiff from his fraud, was correct, unless some of the objections of the counsel thereto are well taken. It is insisted that he is not, for the reason that he did not sell the stock to the plaintiff. The referee found that it was his stock that the plaintiff purchased of Meigs & Greenleaf, and I think this finding supported by the evidence; but as it is immaterial whether it was his or not, I shall not examine that question.

Where a party, with intent to cheat and defraud another, induces him, by fraudulent means, to purchase stock for value which he knows to be worthless he is liable for the damages sustained, whether the purchase is made from him or another. The elements of fraud and damage are united; and that this gives an action to the injured party is a maxim as old as the law. (*Upton* v. *Vail*, 6 Johns., 181; *Medbury* v. *Watson*, 6 Metcalf, 259.)

It is further insisted that the damages awarded to the plaintiff are greatly excessive, being the entire amount paid for the stock and interest, less the dividends received, for the reason that the stock could have been sold in the market at a trifling loss for some time after the purchase was made. This is not the measure of the plaintiff's damages. That is the difference in value of the stock as the condition of the company really was,

and as it was fraudulently represented to be by Alden. It is true that the price at which the stock readily sold in New York is strong evidence of its value, and would, in the absence of other proof, be controlling. But when the real pecuniary condition of the company is shown, from which it appears that the stock was worthless, the price at which it sold in New York or elsewhere is entitled to no weight upon the question of its value. The plaintiff, relying upon the statements of Alden, purchased the stock, and had a right to retain it, as he did, until he ascertained that the company was bankrupt at the time of the purchase; and when he had ascertained that it was worthless, he was under no obligation to Alden to mitigate his loss by cheating some ignorant purchaser himself. The question is, what was the stock really worth at the time of the purchase; and not what it would sell for by practicing the deceptive arts resorted to by the company and Alden to inflate the price. The referee was, therefore, right in finding that the stock was worthless at the time of the purchase. The plaintiff and Alden were both stockholders of the company. The books of the corporation were competent evidence between them to show the acts of the corporation. (2 Phil. Ev., Edw. ed., 295; Angel & Ames on Corp., 3d ed., 607.) Sworn copies of the books were also competent. (*Grey* v. *Hopkins*, 7 Mod., 129; *Matterom* v. *The Eastern Counties Railway*, 7 C. B., 58.) It is now insisted that the proof, that the books from which the copies were taken were the books of the corporation, was insufficient. But that objection was not taken upon the trial. It cannot now be made. (*Day* v. *Roth*, 18 N. Y., 448.)

The plaintiff having shown that he was entitled to recover against Alden, the order of General Term, reversing the judgment as to him, must be reversed, and the judgment entered on the report of the referee against him affirmed, with costs; and the order as to the other defandants affirmed, and judgment absolute rendered against plaintiff in their favor.

All concur, CHURCH, Ch. J., and ALLEN, J., not sitting.

Judgment accordingly.

Statement of case.

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IN THE MATTER OF THE APPLICATION OF THE COMMISSIONERS OF CENTRAL PARK RELATIVE TO THE OPENING OF CERTAIN NEW AVENUES, ROADS AND PUBLIC SQUARES IN THE CITY OF NEW YORK.

An appeal from an order does not authorize the review and reversal of any other order, however closely the two may be united.

A special and local statute, providing for a particular case or class of cases, is not repealed, or amended as to some of its provisions, by a statute general in its terms, provisions and application, unless the intent to repeal or alter is manifest, although the terms of the general act would, but for the special law, include the cases provided for by the latter.

Accordingly, *held*, that the provision of the act regulating the opening and laying out of streets, etc., in the city of New York, which declares that the reports of commissioners of estimate and assessment, appointed under it, when confirmed, shall be "final and conclusive" (§ 178, chap. 86, Laws of 1813; 2 R. S., 406), was not repealed or affected by the general provisions of the Code prescribing the jurisdiction of this court (Code, § 11), and that an order confirming the report of commissioners of estimate and assessment appointed in proceedings by the commissioners of the Central Park under the act for the laying out and improvement of certain portions of the city of New York (chap. 697, Laws of 1867), which proceedings were governed by the act of 1813, is not appealable to this court.

(Argued November 19, 1872; decided December 10, 1872.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, confirming the report of commissioners of estimate and assessment in proceedings instituted in pursuance of chapters 697, Laws of 1867, by the Commissioners of the Central Park for the purpose of the opening of four parks on the west side of the city of New York. The appeal was by various owners of lands assessed for benefits. (Reported below, 41 How. Pr. R., 12; 4 Lans., 469.)

John E. Develin for the appellants. The order of the General Term, dated August 2, 1872, is appealable to this court. (*N. Y. C. R. R. Co.* v. *Marvin*, 1 Kern., 276; *In re Canal and Walker Streets*, 2 id., 406; *The People* v. *Boardman*, 4 Keyes, 59; *In re Townsend*, 39 N. Y., 171; *Rens.*

and Sar. R. R. Co. v. *Davis*, 43 id., 137; Code, § 11, sub. 3; *In re Palmer*, Ct. App., Jan. term, 1869 [not reported]; *Eaton* v. *Alger*, 47 N. Y., 348; *Pearson* v. *Lovejoyce*, 53 Barb., 407; *Hudler* v. *Golden*, 36 N. Y., 446; *Williams* v. *Merle*, 11 Wend., 80; *Westbrook* v. *Willey*, 47 N. Y., 457.)

Richard O'Gorman, corporation counsel, for the respondent. The order of the General Term was final, and no appeal could be had to this court. (Valentine's Laws, 1198; *In re Bowery Extension*, 2 Abb., 368; *In re Seventy-sixth Street*, 12 id., 317; *In re Sixty-fifth Street*, 23 How., 256; *Mayor* v. *Erben*, 38 N. Y., 311; *In re Canal and Walker Streets*, 2 Kern., 411; *King* v. *Mayor, etc.*, 36 N. Y., 189; *N. Y. C. R. R. Co.* v. *Marvin*, 1 Kern., 276.)

ALLEN, J. The appeal is from the order of the Supreme Court, confirming the report of commissioners of estimate and assessment, and brings up for review no other part of the proceedings or any other order or direction made or given by the court in the course of the proceedings for acquiring the title to the lands mentioned in the report. Upon an appeal from a judgment, this court may review any intermediate order involving the merits, and necessarily affecting the judgment. (Code, § 11, sub. 1.) But an appeal from an order does not authorize the review and reversal of any other order, no matter how closely the two orders may be united, or how interdependent they may be. The regularity and validity of all orders prior to that from which the appeal is brought must be assumed, and if they were unauthorized by law, and the proceedings are radically defective for want of conformity to the law, or for any other reason, the remedy of any party aggrieved is by resisting the payment of the assessment, or retaining his property, as the case may require and he shall be advised. The rule is, that proceedings by which the citizen is deprived of property must, in all matters of substance, in all things that are essential to protect and preserve the rights of the property-holder, and the citizen who is to be burdened, conform to the statute by which they are authorized.

The validity of these proceedings will be open to contestation hereafter, whatever may be the disposal by this court of this appeal. It is not intended to intimate that the proceedings are not in every part and in all respects literally and strictly in conformity with law, and valid. We have not examined them, and do not mean, therefore, to suggest a doubt as to their validity, or an impression either way. This right to contest the legality of the proceedings existing, there would be no apology for going beyond the appeal, to consider matters not strictly and regularly before us. The Code is broad enough to give an appeal to this court from the order confirming the report of the commissioners. It was made in a special proceeding, and does affect substantial rights, and is final. (Code, § 11,. 3.) If, therefore, this provision of the Code controls, this court has jurisdiction of the appeal. The proceedings were under chapter 697 of the Laws of 1867, by which the commissioners of the Central park were authorized to acquire title for the use of the public avenues, squares, etc., that had been or might be laid out or retained by them. By the third section of the act it was declared that the proceedings to acquire title to such lands should be had pursuant to such acts as should at the time be in force relative to the opening of public squares, streets, etc., in the city of New York. This includes the proceedings in every stage, from the first to the last, and embraces as well the measures prescribed for the estimate of the damages to the landowner, and the expenses of the process and the assessment of the benefits, as the incipient steps for appropriating the land.

The law of 1813 (2 R. L., p. 408), regulating the opening and laying out of streets, etc., in the city of New York, is still in force, and except as modified by subsequent legislation, prescribes the forms of procedure in all cases. Section 178 of that act authorizes the appointment by the Supreme Court of three discreet and disinterested persons as commissioners of estimate and assessment, and gives specific directions for the regulation of the commissioners in the performance of their duties and for the making of their report to the court. The

court is, by the same section, empowered by rule or order to confirm the report, or refer it back to the same commissioners or to new commissioners for revisal, and repeated revisals are authorized, as right and justice shall require, until a report shall be made, which the court shall confirm, and declares that "such report when so confirmed shall be final and conclusive, as well upon the said mayor, aldermen and commonalty of the city of New York, as upon the owners, lessees, persons and parties interested in and entitled unto the lands, tenements, hereditaments and premises mentioned in the said report; and also upon all other persons whomsoever."

Language could not more plainly indicate the intention of the legislature, that every question connected with the estimate and assessment, everything that could in any form be litigated before and passed upon by the commissioners, should be finally and conclusively determined by the Supreme Court, without further appeal or right of review or ulterior litigation. Every provision was made that could be necessary for a just and fair estimate and assessment, with the right of repeated reviews and deliberate determination by different commissioners and successive reviews by the court, and every safeguard against injustice, mistake, error of judgment and wrong is carefully provided. There is an obvious propriety in confining the right of review to the Supreme Court, in an action connected with public assessments, when coupled, as in this case, with ample power to redress wrong and correct mistakes. If it were otherwise, a single litigant might arrest important public works for years. The act declares the order of the Supreme Court final and conclusive upon all, and neither by writ of error or by appeal can it be reversed or reviewed. Could it be, it would not be final and conclusive. This provision is not repealed or affected by the general provisions of the Code prescribing the jurisdiction of this court. It is certainly not repealed in terms, and is not repealed by implication. The two acts are not repugnant. Both can stand, and full effect be given to each, and the rule is well settled that when that is the case, a prior act is not repealed by a later.

The law does not favor a repeal of statutes by implication. To work a repeal by implication, the intent of the legislature must be very apparent, or the two laws must be so incongruous and repugnant, that effect cannot be given to both. Here the legislation by the two statutes is not upon the same subject. In the one case, provision is being made for a municipal government and the creation of a special jurisdiction, and every part of the enactment is designed to make a part of a complete whole, and all together constituting an entire system perfect in itself; and in the other case, the legislature was prescribing the jurisdiction of an appellate court by general rules, having no reference to special and particular enactments governing special cases. A special and local statute, providing for a particular case or class of cases, is not partially repealed or amended, as to some of its provisions, by a statute general in its terms, provisions and application, unless the intention of the legislature to repeal or alter the particular law is manifest, although the terms of the general act would, taken strictly, and but for the special law, include the case or cases provided for by it. (*Capen* v. *Glover*, 4 Mass., 305.)

As was said by PARKER, J., of a similar statute: "The whole proceeding is a special creation of the statute, and seems designed to form a complete system of itself, entirely independent of the general provisions of the statute authorizing appeals to this court." (*N. Y. C. R. R. Co.* v. *Marvin*, 1 Kern., 276.) In this case, an appeal from an order confirming the report of commissioners for appraising the damages for lands taken for railroad purposes, the statute declaring that such order should be "final and conclusive," was dismissed.

In the Matter of Canal and Walker Streets (2 Kern., 406) an appeal from an order confirming the report of the commissioners under the act of 1813, for laying out and opening streets in New York city, was dismissed.

In *King* v. *Mayor of New York* (36 N. Y., 182) it was sought to review the action of the Supreme Court in respect

to the report of commissioners under the same act by writ of error, and the principles of the cases cited above were reaffirmed, and the writ dismissed.

In *Mayor of New York* v. *Ecker* (38 N. Y., 305) the question was presented in a different form, and the report of the commissioners confirmed by the Supreme Court held conclusive and final in all courts and upon all persons.

The cases relied upon by the counsel for the appellant to sustain this appeal are not in conflict with this view of the operation and effect of the law of 1813, declaring the order of the Supreme Court confirming the report of the commissioners final and conclusive. *R. & S. R. R. Co.* v. *Davis* (43 N. Y., 137) and *In re Townsend* (39 id., 171) were appeals from original orders appointing commissioners, and involved the question as to the right of the petitioners to take the lands, and not the appraisal and estimate of their value, and the statute nowhere declares that the order of the court appointing commissioners shall be conclusive as to the rights of the applicant to take property *in invitum*.

The People v. *Boardman* (4 Keyes, 59) was an appeal from a judgment on *certiorari* removing into the Supreme Court proceedings under the landlord and tenant act, and there is no claim that the judgment of the Supreme Court in such case is made final by any statute. Whether the report was in proper form, the proceedings of the commissioners legal, and the decisions upon questions of law right, and whether the report was fair and just upon all the evidence, was determined by the Supreme Court, and when the law declares that the order of that court is final, it cannot be reversed upon any suggestion of irregularity, mistake or error, either of law or fact.

The appeal must be dismissed.

All concur.

Appeal dismissed.

Statement of case.

THE PEOPLE OF THE STATE OF NEW YORK et al., Appellants, v. SIMON SCHOONMAKER et al., Respondents.

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The right to a preliminary injunction or to an injunction *pendente lite* rests in all cases in the discretion of the court of original jurisdiction. An order therefore dissolving such an injunction does not affect a substantial right, and is not reviewable in this court.

It does not follow from an allegation or averment of a litigant of the unconstitutionality of a particular law which enters into or even which may be the foundation of a litigation, that every order made in the progress of the action involves the constitutionality of such law within the meaning of subdivision 4 of section 11 of the Code, as enacted in 1865.

It seems that to bring a case within that provision, the court in making the order complained of must have passed directly upon the constitutional question, and the intent of the legislature was to restrict such appeals to cases in which a law of the State is declared unconstitutional and a party thus deprived of some right given by the statute.

(Argued December 8, 1872; decided December 10, 1872.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, affirming an order of Special Term vacating a temporary injunction.

This action was brought to restrain defendants from issuing the town bonds of the town of Rosendale, Ulster county, in aid of the construction of the Wallkill Valley railroad. Defendants were appointed commissioners of that town under chapter 311, Laws of 1868. A temporary injunction was granted upon the complaint. Upon motion of defendants the injunction was vacated. Plaintiffs claimed that the act under which the bonds were issued is unconstitutional.

T. R. Westbrook for the appellants. The issue of the bonds would be unconstitutional. (State Const., art. 7, § 9; *Bank of Rome* v. *Village of Rome*, 18 N. Y., 38; *Gould* v. *Town of Sterling*, 23 id., 456; *Barto* v. *Himrod*, 4 Seld., 483; *People* v. *Mitchell*, 35 N. Y., 551; *Thompson* v. *Lee County*, 3 Wal., 329; *People* v. *Hurlburt*, 46 N. Y., 110, 113; *People* v. *Township Board*, 9 Am. Law Reg. [N. S.], No. 8 [O. S.], vol. 18, 496; *Whiting* v. *Sheboygan R. Co.*, 9 id., No. 3 [O. S.], 18,

156; *Hansen* v. *Vernon*, 29 Iowa; *Street* v. *Hulbert*, 51 Barb., 312.) The appeal to this court is proper; it involves the merits of the action and no question of discretion. (*Paul* v. *Munger*, 47 N. Y., 469, 472–473.)

Samuel Hand for the respondents. The order appealed from dissolved a temporary injunction, not affecting a substantial right, and is not appealable to this court. (Code, § 11, sub. 4; *Hasbrouck* v. *The Kingston Board of Education*, 3 Keyes, 480; *Paul* v. *Munger*, 47 N. Y., 469; *Townsend* v. *Hendricks*, 40 How., 143; *Thompson Pro. Rem.*, 336, § 7; *Bruce* v. *Del. and Hud. Canal Co.*, 19 Barb., 371; *Crocker* v. *Baker*, 3 Abb., 181; *Secor* v. *Weed*, 7 Rob., 67.) The constitutionality of the act under which the bonds were issued is well settled. (*Bank of Rome* v. *Village of Rome*, 18 N. Y., 38; *Starin* v. *Town of Genoa*, 23 id., 439; *Gould* v. *Town of Sterling*, 23 id., 439; *Clark* v. *The City of Rochester*, 28 id., 604; *People* v. *Mitchell*, 35 id., 551; *In re Tax-payers of Kingston*, 40 How. Pr., 444; *People ex rel. Harris* v. *Smith*, Albany Law Jour., vol. 4, No. 4, p. 64.)

ALLEN, J. This case cannot be distinguished from *Paul* v. *Munger* (47 N. Y., 469).

The right to a preliminary injunction, or to an injunction *pendente lite*, rests, in all cases, in the discretion of the court of original jurisdiction. It is not an absolute right in any case, and therefore an order dissolving an injunction does not affect a substantial right, as that term is used in the statute, giving jurisdiction, to this court, of appeals from orders. The question was considered and deliberately decided, and the court adheres to the decision then made. The merits in the case of *Paul* v. *Munger* were considered by the court below in making the order complained of, and the appellant made a strong case for retaining the injunction; tion and had the order been reviewable here, it would, I think, have been reversed. The fact that the merits of the controversy were before the court in the present instance does not

give jurisdiction to this court. It did not and could not, in the nature of things, terminate the litigation. The action is still pending, and the issues must be tried, and judgment given precisely as if no order of injuction had ever been made or vacated.

The appellants claim that this order is reviewable here, under subdivision 4 of section 11, as enacted in 1865, as involving the constitutionality of a law of this State.

It does not follow, from an allegation or averment of a litigant, that a particular law which enters into, and, perchance, may be the foundation of the litigation, is unconstitutional; that every order, made in the progress of the action, involves the constitutionality of such law. This particular provision was framed to meet a special exigency, and to provide for a single case, and hence, like other enactments, designed for a special purpose and particular application, is not easy of interpretation, when a general application of it is sought to be made. But it would seem that, to bring a case within the provision, that the court, in making the order complained of, must pass directly upon the constitutional question; and the intent of the legislature appears to have been to restrict the appeal to cases in which a law of the State is adjudged unconstitutional, and a party is by the order of the court deprived of some right which the statute gives him. But without passing upon the construction of the act, it is sufficient to say that it nowhere appears that the court below have granted this order dissolving the injunction upon any views they may have had of the validity of the statute under the Constitution. Had the court agreed with the appellants as to the claimed unconstitutionality of the act, they may well have refused to continue the injunction, for the reason that the plaintiffs could not sustain injury by the threatened acts of the defendants; certainly no irreparable injury.

If the act was void, the bonds to be issued by the commissioners will be void; and neither the tax-payers of the town of Rosendale nor the people at large can sustain any injury.

Statement of case.

Conceding the legal rights of the plaintiffs to maintain the action, their right to a preliminary injunction was not an absolute right, but depended upon other circumstances which were addressed to the discretion of the court.

The appeal must be dismissed.

All concur.

Appeal dismissed.

IN THE MATTER OF THE PETITION OF ADAM S. CAMERON ET AL. TO VACATE AN ASSESSMENT FOR PAVING MADISON AVENUE, ETC., IN THE CITY OF NEW YORK.

An assessment for local improvements under the act of 1871, amending the act reorganizing the local government of New York (chap. 574, Laws of 1871), is invalid unless the commissioner of public works has certified to the board of assessors the amount of expenses paid or actually incurred by the city, as required by section 5 of said act. No other evidence can be substituted.

An assessment was made for paving a portion of Madison avenue. The certificate of the commissioner only stated the prices fixed by the contract for the work. It was accompanied by an affidavit of the surveyor stating the amount of work done, but the affidavit was not referred to in the certificate or made part thereof. *Held*, that the provision of the act was not complied with, and the assessment was void.

(Argued December 10, 1872; decided December 17, 1872.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, reversing an order of Special Term vacating an assessment for paving Madison avenue, in the city of New York, from Forty-second to Eighty-sixth streets.

The objections to the assessment were, that the resolution and ordinance in pursuance of which the work was done had not been published, as required by section 7 of the charter of 1857, and that the assessment was never confirmed by the common council.

A portion of the proceedings were not published in the

New York Leader, an official newspaper. An assessment was made under chapter 574, Laws of 1871. The facts in reference thereto appear in the opinion.

Charles E. Miller for the appellants.

D. J. Dean for the respondents.

RAPALLO, J. The publication of the resolution authorizing the improvement in question was held by the court below insufficient, and we concur in that conclusion, there having been no publication whatever as to one board. The assessment or reassessment, under the act of 1871, was resorted to, probably, for the purpose of curing this defect. This assessment was, however, invalid for want of a certificate of the commissioner of public works, as to the amount of expense paid or actually incurred by the city. The act of 1871 requires the certificate of that officer, and does not authorize the substitution of any other evidence as to the amount of expenses paid or incurred. By the certificate produced, the commissioner certifies only the prices fixed by the contract, but is silent as to the amount of work done and as to the expense paid or incurred. An affidavit of another party stating the amount of work done, and from which the expense could be computed, appears to have accompanied this certificate; but this affidavit is not adopted or even referred to in the certificate of the commissioner, or made part thereof. The commissioner of public works does not certify to the matters stated in the affidavit. He has not, therefore, certified as to the expense paid or incurred. The act of 1871 was not complied with, and there is no ground upon which the assessment can be sustained.

The order appealed from should be reversed, and the order made at Special Term affirmed, with costs.

All concur.

Ordered accordingly.

Statement of case.

IN THE MATTER OF THE PETITION OF FERDINAND MAYER TO VACATE AN ASSESSMENT FOR SEWERS, ETC., IN THE CITY OF NEW YORK.

If the title of an act fairly and reasonably announces the subject, and that is a single one, and if the various parts thereof have respect or relate to that subject, the provision of the Constitution that no local or private bill shall embrace more than one subject, and that shall be expressed in its title (State Constitution, art. 3, § 16), is complied with. The degree of relationship of each provision is not material if it legitimately tends to the accomplishment of the general purpose.

The general subject of local improvements includes not only the plan and construction of contemplated work, but the means by which the work may be accomplished, the proceedings necessary to be adopted for assessing and paying the expenses and the remedies to parties for redress of grievances arising out of their construction.

The act, therefore, entitled "An act in relation to certain local improvements in the city of New York" (chapter 580, Laws of 1872), is not violative of said constitutional provision, and an assessment under it for constructing a sewer will not be vacated for an omission to file a plan of sewerage, embracing the sewer in question, where no fraud is shown. (Section 7 of said act.)

(Argued December 10, 1872; decided December 17, 1872.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, affirming an order of Special Term denying a motion to vacate an assessment for sewers in Seventy-ninth and Eightieth streets, between Avenue A and Third avenue.

The objection to the assessment relied upon principally was, that a portion of the sewers were constructed in streets not included in a sewerage district plan adopted or filed previous to making the contract for the work.

Charles E. Miller for the appellant. Chap. 580, Laws of 1872, is unconstitutional; being a local bill, it embraces more than one subject. (*In re Blodgett*, Ct. of App.; *Town of Fishkill* v. *Plank-road Co.*, 22 Barb., 634; *People* v. *Hills*, 35 N. Y., 449; *Baldwin* v. *Mayor*, 2 Keyes, 387, 392; *People* v. *O'Brien*, 38 N. Y., 193; *Smith* v. *Mayor*, 7 Robt., 190;

Pullman v. *Mayor*, 54 Barb., 169; *Gaskin* v. *Meek*, 42 N. Y., 186; *People* v. *Commissioners of Highways of Town of Palatine*, 53 Barb., 70; *People* v. *Allen*, 3 Hand, 404–417; *People ex rel. Lee* v. *Board of Supervisors of Chautauqua County*, 4 id., 10.)

D. J. Dean for the respondents. The title of chapter 580, Laws 1872, sufficiently indicates its subject to bring it within section 16, article 3, Constitution. (*The Sun Mut. Ins. Co.* v. *The Mayor*, 4 Seld., 509; *The People ex rel. Davis* v. *The Commissioners of Taxes*, 47 N. Y., 501.)

CHURCH, Ch. J. The omission to file a plan of sewerage, embracing the sewer in question, was held by this court to be an irregularity fatal to the assessment, prior to the act of 1872. (46 N. Y., 178.) The seventh section of the latter act expressly provides that assessments shall not be vacated for irregularities of this and the like character, unless fraud be shown. It is claimed that this act of 1872, being chapter 580, entitled "An act in relation to certain local improvements in the city of New York," is a violation of that provision of the Constitution which declares that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in its title."

That this is a local bill there is no doubt, and the question is whether there is more than one subject embraced in its provisions, and whether that is expressed in its title. A brief synopsis of the bill will best exhibit the nature of its provisions. The first section declares that no contract entered into within the last five years for making certain specified local improvements shall be held valid, if certain irregularities have occurred, unless the commissioners appointed by subsequent provisions shall certify that no fraud has been committed in respect to them, but if so certified they are confirmed.

Section 2 appoints the commissioners who are authorized to examine into such contracts and the awards for the same,

and provides for a hearing of the parties interested upon notice, and declares the effect of their decision.

Section 3 requires payments to be made upon such contracts as are certified to be free from fraud, and authorizes the commissioners to extend the time for the performance of such contracts for a period equal to the time which the contractor may have been delayed by any act of the city.

Section 4 extends the provisions of chap. 397 of the Laws of 1852, entitled "An act to authorize the mayor, aldermen and commonalty of the city of New York to issue assessment bonds," to assessments made or to be made according to law for improvements, whether the ordinances were passed by the common council or not, and regulates the interest on payments to contractors, and per centages to be retained.

Section 5 requires the comptroller to certify the expenses incurred under the contracts mentioned in the first section of the act, and to the board of assessors who are required to assess the same according to law, and applies all the laws in relation to assessments for local improvements to such expense and assessments.

Section 6 continues and establishes the board of revision and correction authorized by chap. 308 of the Laws of 1861, and confirms their previous action.

Section 7 provides that no assessment for such improvements shall be vacated or set aside for irregularity unless actual fraud is shown, but exempts its application from proceedings commenced before January 1, 1872.

Section 8 authorizes the employment by the commissioners of a clerk, and provides for his and their compensation, and section 9 repeals all laws inconsistent with the act.

From this summary of the act it is manifest that its provisions relate to local improvements. The Constitution does not require that the title of an act should be the most exact expression of the subject which could be invented. It is enough if it fairly and reasonably announces the subject of the act. Is there any other subject embraced in the provisions of this act than that relating to local improvements? I think

not. A subject is that of which anything may be affirmed or predicated, and if the various parts of this act have respect to or relate to local improvements, the act is not obnoxious to the constitutional objection interposed, and the degree of relationship, if it legitimately tends to the accomplishment of the general purpose, is not material.

The general subject of local improvements includes their plan and construction not only, but the means by which the work is accomplished, and the proceedings necessary to be adopted for these purposes, for assessing and paying the expenses incurred, as well as the remedies to parties for redress of grievances growing out of their construction. A general title relating to local improvements would be understood to include, or at least that it might include, these several details. No one could be deceived or misled by such a title.

The learned counsel for the appellant would require seven distinct bills to embrace the provisions of this one. 1. In relation to the specified contracts. 2. Awards of contracts. 3. The appointment of commissioners, and so on to the end, requiring nearly every section of the bill to be an independent bill, on the ground that it embraces an independent subject. The counsel argues: "A contract is not a local improvement, but rather the means or instrumentality by which local improvements are accomplished." Do not the means or instrumentality by which local improvements are made *relate* to the subject of local improvements? If they do, they are embraced in the title, and that they do is self-evident. And this is true of all the provisions. They relate to the general subject of local improvements, which includes their construction and mode of paying the expenses. The commissioners appointed have a duty to perform relative to contracts for local improvements. The act of 1852, which is adopted, provides for issuing bonds in advance of collecting assessments for local improvements. The act of 1861, which created a board of revision of assessments for such improvements, is substantially re-enacted, and the additional powers conferred

relate to the same subject. The remedy by petition under the act of 1858 is preserved, but the grounds for vacating assessments are restricted to actual fraud. All these provisions are germain to the title. It was competent for the legislature to repeal the act of 1858 as to vacating assessments, and of course to regulate and limit it as they deemed proper. (40 N. Y., 561.)

There is but one provision in the bill about which any doubt could exist, and that is, in several of the sections the proceedings are made applicable to local improvements "and other public works," and the question occurred whether "other public works" might not be a different class of works from those specified; but by the 4th section of the act these are defined to be such improvements as are paid for by local assessments, so that all works, the expense of which is locally assessed, are local improvements within the meaning of the act. They refer to a class of improvements, and embrace those defined in section 4. Whether in the practical working of this act greater laxity in the performance of official duties may not exist, or whether other provisions of the Constitution protecting persons from being deprived of private property without the process of law may not be violated, are questions not involved in this case. The only point relates to the title, and its relation to the provisions of the bill. From the frequency with which questions under this clause of the Constitution have been presented to the court, I infer that erroneous views are entertained upon the subject.

Nothing that this court has ever decided, nor indeed so far as I have examined any other court, justifies the position that the various means adopted in a bill to carry its general design must be enacted by separate bills or embraced in the title in order to escape the operation of the clause in question. Courts cannot legislate nor dictate legislation, nor have they any concern with the propriety or wisdom of legislation.

They can only determine the question of power, and there must be a substantial departure from the organic law to justify a decision that an act is invalid. To adopt the views

urged upon the court in this and some other cases, would embarrass legitimate legislation and be the means of creating more mischief than the constitutional clause was designed to prevent.

The order must be affirmed.

All concur.

Order affirmed.

IN THE MATTER OF THE PETITION OF SARAH E. BASSFORD ET AL. TO VACATE AN ASSESSMENT FOR PAVING AVENUE B, IN THE CITY OF NEW YORK.

In an application to vacate an assessment under the act in relation to frauds in assessments for local improvements in the city of New York (chap. 338, Laws of 1858), the *onus* of establishing the alleged fraud or irregularity is upon the applicant, and he must make it appear that such fraud or irregularity exists before he is entitled to the relief sought.

A single publication of a resolution authorizing a specific improvement in the city of New York two days before its adoption is a sufficient compliance with the provision of the city charter of 1857 (§ 7, chap. 446, Laws of 1857), which prohibits the passage or adoption of such resolution until it has been published in all the newspapers employed by the corporation at least two days. (Opinion of INGRAHAM, J., note.)

(Argued December 10, 1872; decided December 17, 1872.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, reversing an order of Special Term vacating an assessment for paving Avenue B, in the city of New York, with trapblock pavement, from Houston street to Fourteenth street.

On the 30th December, 1871, the petitioners presented their petition pursuant to chapter 338, Laws of 1858, for the vacation of above assessment. The grounds stated were: 1st. That said assessment was never confirmed by the common council of the city of New York. 2d. That the resolution and ordinance authorizing the work were not published,

as required by the seventh and thirty-seventh sections of chapter 446, Laws of 1857 (the city charter).

The original resolution authorizing the work was published once, two days before its passage, by the board of aldermen, and also before its passage by the board of councilmen. A communication from the Croton aqueduct board to the board of aldermen, with resolution attached amending the original resolution, was also published, with proceedings of the latter board, two days before its adoption, and the amended resolution was also published two days before its passage by the board of councilmen. The work was done under the amended resolution.

The assessment list was confirmed by the board of revision and correction, constituted by chapter 308, Laws of 1861, but it did not appear that it was confirmed by the common council.

Charles E. Miller for the appellants. The resolution and ordinance were adopted before they had been published two days, as required by section 7 of the charter of 1857. (*In re Douglass*, 1 Sickels, 42; *In re Gordon*, decided December, 1871, CARDOZO, J.)

D. J. Dean for the respondents. One publication made two days before action of the respective boards is sufficient. (§ 7, chap. 446, Laws of 1857.) The statute is directory, not mandatory. (Sedg. on Stat. and Const. Law, 370, 371; *Cole* v. *Green*, 6 Man. & Gran., 872; *Regina* v. *Fordham*, 11 A. & E., 88; *Rex* v. *Leicester*, 7 Barnes & Cres., 6; *Striker* v. *Kelly*, 7 Hill, 9; 12 Wend., 581; 19 id., 143; 4 Seld., 88; 34 N. Y., 268.)

ANDREWS, J. We concur in the opinion expressed by INGRAHAM, J., at General Term, that there was a publication of the resolution and ordinance for the improvement, for which the petitioners have been assessed, within chapter 446 of the Laws of 1857; and we adopt the reasons expressed in that opinion upon this question.*

* The following is the opinion of INGRAHAM, J., referred to and adopted by the court:

Opinion of the Court, per ANDREWS, J.

It is claimed, however, that the assessment was void for another reason, viz., that the assessment list was not confirmed by the common council, as required by the act of 1813. By that act such confirmation was necessary in order to create a lien upon the property assessed. (Valentine's Laws, p. 1191.) By chapter 308, Laws of 1861, the power to confirm assessment lists, theretofore possessed by the common council, was conferred upon a board of revision and correction thereby constituted.

It appears in the case that the assessment in question was

INGRAHAM, P. J. In the case of Douglass, it was held in this court that one publication two days before the passage of the resolution was sufficient. That case, I understand, was reversed, on the ground that there was no sufficient publication before the passage of the resolutions in each board. I am still of the opinion that the statute only requires the notice to be published once, and that the resolution shall not be passed until two days after such notice. The statute says the resolution, etc., shall not be passed or adopted until after such notice has been published at least two days. ANDREWS, J., in the case of Douglass, says: "The design was to apprise the tax-payers in the manner pointed out in the statute of any contemplated improvement, that by remonstrance or suggestions the same might be modified or prevented." It is reasonable to suppose that such notice would be more available by waiting two days after its publication than by requiring two publications within twenty-four hours previous to the time of acting.

There was nothing in the Douglass case that decided this question, and I see no reason for changing the views on this point. All laws requiring a party to have a given number of days notice have been construed to mean one notice served so many days before the act can be done. Thus the notice of time to plead used to be a notice of twenty days. A notice of trial is fourteen days, and so in regard to all other notices served on the opposite party. The notice of sale by sheriffs and other notices to be published are generally directed to be published once a week or oftener by special direction. I think these orders should be reversed.

In addition to what has been said as to all the cases, we think the publication of the resolution as sent to the board of aldermen in the communication of the Croton board was a sufficient compliance with the statute. The object of the law was to provide notice to persons interested that such a proposition was pending before them. That object was as fully attained by publishing the resolution as recommended by the Croton board, as if would have been if offered by a member of the board of aldermen. Either would give notice of the pendency of the resolution before the board. That is all the law requires.

confirmed by this board; but it is claimed by the appellants that the act constituting such board is in violation of section 16, article 3 of the Constitution, which provides that "no private or local bill shall embrace more than one subject, and that shall be expressed in its title."

This is a proceeding under chapter 338, Laws of 1858, which authorizes any party aggrieved by an assessment for a local improvement in the city of New York, and who alleges any fraud or irregularity therein, to apply to a judge of the Supreme Court for a hearing in respect thereto.

The second section provides that if, upon the hearing, "it shall appear that the alleged fraud or irregularity has been committed, the said assessments shall be vacated; and the lien created thereby, or by any subsequent proceedings, shall cease."

In an application to vacate an assessment under this act, the *onus* of establishing the alleged fraud or irregularity is upon the applicant.

It does appear that the board, constituted by the act of 1861, assumed to act upon and confirmed this assessment; but it does not appear from the proof made, or by any legal inference therefrom, that the assessment was not also confirmed by the common council under the act of 1813.

The party availing himself of the summary remedy, given by the statute of 1858, must make it "appear" that the alleged fraud or irregularity exists before he is entitled to relief under it.

If the act of 1861 was unconstitutional, then the common council had authority to confirm this assessment; and in the absence of proof that it did not do so, it cannot be assumed that the authority was not exercised.

If the act was constitutional, then it affirmatively appears that the assessment was legally confirmed.

In either respect it is unnecessary to consider the question raised as to the validity of the act.

The order is affirmed, with costs.

All concur. Order affirmed.

Statement of case.

IN THE MATTER OF THE PETITION OF ANTHONY DUGRO TO VACATE AN ASSESSMENT FOR PAVING FIFTY-EIGHTH STREET, ETC., IN THE CITY OF NEW YORK.

The grant of power to the common council of the city of New York by the "Montgomerie charter," so called (Davies' Laws of N. Y., p. 177, § 16; Valentine's Laws, 228), to make and lay out streets, etc., in said city, and the authority conferred upon the municipal corporation to direct the pitching and paving of streets, and to assess the expense upon property benefited (Laws of 1813, chap. 86, § 175; 2 R. L., 407), gives the common council full discretion, save as curtailed or controlled by legislative action. They are the sole and exclusive judges as to the time, mode and manner of laying out, making, grading and paving streets, and also as to the material of which the streets shall be made, or with which they shall be paved. This discretion and choice being an important and valuable constituent of the power conferred, and being in the interests of the public, will not be deemed revoked by implication or doubtful inference.

Accordingly *held*, that the common council was not prohibited from making or paving a street in a manner or with a material not admitting of competitive bids or proposals by the provision of the "act to reorganize the local government of New York," which requires all work to be done and supplies to be furnished to be by contract, where the expenditures will exceed $1,000; and directs all contracts to be made or let, after advertisement, to the lowest bidder. (Laws of 1870, chap. 137, § 104.)

(Argued December 10, 1872; decided December 17, 1872.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, affirming an order of Special Term denying an application to vacate an assessment for paving Fifty-eighth street with Nicolson pavement, between Third avenue and Lexington avenue, in the city of New York.

The ground of the application was that the pavement was a patent pavement; and as it could not be made the subject of competitive bids, the contract for laying it violated section 104 of chapter 137, Laws of 1870, and was, therefore, void. The contract for the work was made in 1870, after the passage of the act. Advertisements for bids for the work were

duly published. Only one bid was received, which was from the president of the Nicolson Pavement Company, and the contract was let to that company at the prices named in the bid.

Charles E. Miller for the appellant. Under the charter of 1870, work and supplies, which cannot be made the subject of competition, cannot be contracted for by the corporation. (*Dean* v. *Charlton*, Wis. [N. S.], 564; Law, 1870, chap. 137, p. 371; 33 N. Y., 309, 328; Charter of 1870, § 104.)

D. J. Dean for the respondent. The provisions of the statute do not expressly, or by necessary implication, prohibit the corporation from purchasing a patented pavement. (*Harlem Gas-light Co.* v. *Mayor*, 33 N. Y., 330; *People* v. *Flagg*, 17 id., 584; *Hobert* v. *City of Detroit*, 7 Am. Law Reg., 741; Montgomerie Charter of 1730, *vide* §§ 14, 16; Valentine's Laws, 225, 228; *Astor* v. *The Mayor*, N. Y. Transcript, February 8, 1869; opinion by INGRAHAM, J.)

ALLEN, J. Among the general powers vested in the common council of the city of New York, is that of "making and laying out all the streets, lanes, alleys and highways in and throughout the said city, the island of Manhattan, in such manner as the said common council for the time being, or the major part of them, shall think or judge to be necessary and convenient for all inhabitants and travelers there." (Montgomerie charter, § 16; Davies' Laws of N. Y., 177.) This grant of power is of a public nature, and may be exercised by the common council at discretion, except as curtailed or controlled by legislative action. Intimately connected with this general power is the authority conferred upon the municipal corporation to order and direct the pitching and paving the streets of the city, and to assess the expense upon property benefited in proportion to the advantages resulting from the improvement. (2 R. L., 407, § 175.) These powers are conferred for public purposes, and while they are to be

exercised in conformity to legislative direction, and are subject to be revoked by the sovereign power, except as secured by constitutional inhibition, the common council may, save as restrained by and subject to the directions of the legislature, exercise their discretion feely as to the time, mode and manner of laying out, making, grading and paving streets, and also as to the material of which the streets shall be made, or with which they shall be paved. The common council are the sole and exclusive judges of the particular character of the streets and the quality and kind of pavement which the public interests require or will be most beneficial to the property intended to be benefited and liable to be assessed, as well as to what is "necessary and convenient for all inhabitants and travelers there." This discretion and choice, in all the respects mentioned, is an important and valuable constituent of the power conferred, and without it, the power itself would be defective, and the public service would be liable to suffer. Such discretion will not be deemed revoked by implication or doubtful inference. Acts directory in their character, although imperative so far as effect can be given them consistently with the exercise of the general powers conferred, cannot be regarded as indicative of an intent to curtail the power or limit the discretion of the common council, except in the matters and to the extent declared by such acts. The act of 1870, to reorganize the local government of the city of New York (chap. 137 of the Laws of 1870) expressly continues and reaffirms the grants, powers and privileges theretofore held by the municipalty, and not modified or repealed by the provisions of that act. Section 22 merely ordains that no taxes or assessments shall be imposed or debts contracted except as authorized by law, and that all the legislative power shall be subordinate to and be exercised in conformity with such grants, restrictions or limitations as were or might be prescribed by the legislature, and does not affect or impair the obligations or add to the sanctions of any statute. It is a declaration that statutory powers must be exercised in subordination and conformity to

the statute creating them. Section 104 of the act is relied upon as a limitation upon the powers of the common council to the extent of a prohibition to undertake any work, or order or direct the making or paving any street, in a manner or with a material which will not admit of competitive bids or proposals. It requires all work to be done and supplies to be furnished by contract when the expenditure will exceed $1,000, and directs all contracts to be made or let after an advertisement for proposals, and to the lowest bidder.

The statute was complied with, in that the proper officers of the city did advertise for bids or proposals for paving the street, and the contract was let to the only bidder, and at the price named in the bid. The objection is that the "Nicolson pavement" was patented, and the right to lay it was in a single person or corporation, and that therefore the advertisement being for bids to pave the street with that particular pavement, there could be no competition, and the form of advertising for and receiving bids and acting upon them was but a form, and was not and could not be a compliance with the act looking to competition, and it is claimed that the contract based upon the proceedings was void, and the assessment for the work therefore illegal. It is urged that because a statute prescribing general rules for the exercise of the powers granted to the municipal corporation are not in all their detail applicable to every case that may arise, that, to the extent they cannot be applied, the powers are annulled and cannot be exercised. This would be to give undue effect to the act prescribing the forms of procedure, and modal in its character, at the expense of the general grant of power. Whether the corporate authorities could or should have known that there could be no possible competition for the work (if such was the fact, which is not entirely certain), and, knowing that, could or should have made a contract without advertising for bids, need not be considered. There is no pretence of fraud, or that the contract, as made, was not a provident and proper contract, and reasonable and right in all its terms and provisions, so that the form of advertising and receiving bids can-

not vitiate it, even if no such procedure was necessary. The general rule is, and this case does not form an exception, that statutes prescribing forms of procedure, and providing for the orderly conduct of proceedings by public officers or bodies, are only obligatory to the extent, and in cases to which they are by their terms applicable. The legislature cannot be presumed to have intended to declare that no power should be exercised, or work done, or supplies furnished, unless of a character that would admit of competitive bids. The grant of power was for public purposes, and the discretion vested in the common council was in the interests of the public, and neither the public nor the parties to be benefited by local improvements can be deprived of the benefit of this discretion, or the right to the best or most improved pavements, because full effect cannot in a particular case be given to an act designed for another purpose, to wit, to regulate the exercise of, and not to limit the power. In other cases in this court a like statute, intended to accomplish the same purpose, that is, the performance of work and the furnishing of supplies at the lowest price and on the most favorable terms, although sufficiently broad in its terms to include the contracts and the services in question, was held not applicable to, and therefore as not embracing them. (*People* v. *Flagg*, 17 N. Y., 584; *Harlem Gas Co.* v. *Mayor of New York*, 33 id., 309.)

This case is not within the precise principle ruled in those cases, but it is quite analogous, and much of the reasoning of the judges who then spoke for the court is entirely applicable here. A thing within the letter is not within the statute, unless within the intention. The act of 1870 can have full effect in cases to which it can be applied, but if there are cases to which it could not be reasonably applied, they are not within the intention, and therefore not within the statute. It seems to be absurd to say that all powers and all authority is by necessary implication taken from the municipal authorities except such as can be exercised in strict conformity to this one provision of law—that this section of the law of 1870 is to be the touchstone to determine the limit and extent of

Statement of case.

the powers vested in the common council, and that all other acts must conform to it. It should rather be interpreted with respect to the other statutes to which it is ancillary.

The decisions of the courts in Wisconsin are adverse, while the Michigan courts are in accord with the views now expressed. If, as alleged, there could be no competition for the paving with the Nicolson pavement, the common council had nevertheless the power to cause the street to be paved with it, and it is simply a case not within the statute, although the words are broad enough to include it. It constitutes one of the necessary exceptions to it. No other question was presented upon this appeal, the counsel in terms limiting the discussion to the operation and effect of the provisions of the act of 1870, requiring certain contracts to be given to the lowest bidder, after an advertisement for proposals.

No other ground for vacating the assessment was suggested orally or upon the printed brief, and this ground not being well taken, the order of the Supreme Court must be affirmed.

All concur, PECKHAM, J., not sitting.

Order affirmed.

WILLIAM C. HARRISON, Plaintiff in Error, *v.* THE PEOPLE OF THE STATE OF NEW YORK, Defendants in Error.

To constitute the offence of larceny there must be a taking of the goods from the power or control of the owner. A temporary possession, however, by the thief, though but for a moment, is sufficient.

Plaintiff in error was indicted for larceny. The evidence showed that he put his hand into the coat pocket of complainant, seized the pocket-book of the latter containing a large amount of money and securities, and lifted it about three inches from the bottom of the pocket, when he was prevented. *Held*, that this was a sufficient carrying away to constitute the offence charged.

(Submitted December 11, 1872; decided December 17, 1872.)

ERROR to the General Term of the Supreme Court in the first judicial department, to review judgment affirming judg-

Statement of case.

ment of the Court of General Sessions of the Peace in and for the city and county of New York, entered upon conviction of plaintiff in error of the crime of grand larceny.

Henry H. Bull, collector of the Central National Bank of the city of New York, got on to a street car on the 25th of May, 1872. He had in his possession, in a pocket book in his breast coat pocket, about $25,000 in money and securities. As he was entering the door he was met by the prisoner, who put his hand into Mr. Bull's pocket, seized the pocket-book, and lifted it about three inches from the bottom of the pocket, when he was discovered by Mr. Bull, who seized the pocket-book and thrust it back into his pocket. The prisoner's counsel asked the court to charge that the jury under the evidence could not convict of any other offence than an attempt to commit larceny. The court refused so to charge. He did charge that the least removal of property from the place where it is deposited is a sufficient carrying away to constitute the offence of larceny, provided such removal in the opinion of the jury was of a felonious character. Counsel duly excepted. The jury rendered a verdict of guilty.

William F. Kintzing for the plaintiff in error. To constitute the offence of larceny, there must be an actual taking and entire possession by the thief. (Roscoe Crim. Ev., 570; Wharton Am. Crim. Law, vol. 2, 6th ed., § 1810; Chitty Crim. Law, vol. 3, p. 924; *James Phillips' Case*, 4 City Hall Recorder, 177; Bishop on Crim. Law, vol. 2, 757; Russell on Crimes, vol. 2, p. 14; *State* v. *Carr*, 13 Vt., 571; *State* v. *Wilson*, Coxe, 439.) There must be a severance of the goods from the possession of the owner. (*Rex* v. *Wilkinson*, 1 Hale P. C., 508; *Rex* v. *Thompson*, 1 Moody [British Crown] Cases, 78; *Rex* v. *Cherry*, 1 Leach [Crown Cases], 236; 2 East P. C., 556; 1 Hale P. C., 508; *Rex* v. *Walsh*, 1 Moody [British Crown] Cases, 14; Sess. Laws 1862, chap. 574.)

A. S. Sullivan for the defendants in error. The least removing of the property from the place where it was before,

with an intent to steal it, is a sufficient asportation, though it be not quite carried away. (2 Russ. on Crimes, 4; 1 Hawk. P. C. C., 33, § 25; *Walsh Case*, 1 Moody [Crown Cases], 14.)

FOLGER, J. The plaintiff in error was indicted for simple larceny. The jury, having found him guilty, have fixed upon him the felonious intent. The questions raised in this court, are presented by an exception to a refusal of the court, to charge the jury that they could not convict of any other offence upon the testimony, than an attempt to commit larceny; and an exception to the charge delivered to the jury, that the removal of the property from where it was deposited was a sufficient carrying away to constitute larceny if it was of a felonious character.

Had the coat of the witness Bull, with the pocket-book in it, been off his back, hanging on a hook, the act of the plaintiff in error with felonious intent would, beyond question, have been larceny. Thus, in one case the prisoner, sitting on a coach-box, took hold of the upper part of a bag which was in the front boot, and lifted it up from the bottom of the boot on which it rested. He handed the upper part of the bag to a person who stood beside the wheel, and, both holding it, endeavored to pull it out, but were prevented by the guard. The prisoner being found guilty, the judges, on a case reserved, were of opinion that the conviction was right, thinking that there was a complete *asportavit* of the bag. (*Walsh's Case*, 1 Moody Crown Cases, 14.) And in 2 Russell on Crimes, 153 (margin 6, 4th ed., Lon.), this case purports to be cited from the MS. of BAYLEY, J.; and in the foot note (*i*) the text is said to correspond accurately with that of the MS.; and it is there said: "That if every part of the thing is removed from the space which that part occupied, though the whole thing is not removed from the whole space which the whole thing occupied, the asportation will be sufficient; so, drawing a sword partly out of its scabbard will constitute a complete *asportavit*."

Here, by the testimony, the pocket-book was lifted a space

of three inches from the bottom of the pocket, and every part of it was removed from the space which that part occupied before the plaintiff in error touched it.

But it is claimed that the article being on the person of Bull, and in his actual possession, there is thereby a difference; and that there must be a severance of the goods from that possession. And *Rex* v. *Thompson* (1 Moody Crown Cases, 78) is cited. The prisoner was there indicted for stealing *from the person* a pocket-book and contents. The book was in an inside front pocket of the owner's coat. The book was just lifted out of the pocket, an inch above the top of the pocket. By the forcible act of the owner the hand of the prisoner was brushed away, and the book fell back into the pocket. The prisoner was convicted and had the sentence for that offence. It was insisted that this did not amount to a taking from the person. Six of the ten judges who sat in review held that the prisoner was not rightly convicted of stealing from the person, because, from first to last, the book remained about the person of the prosecutor. Four of the judges were of the contrary opinion. But the ten were of one mind that the *simple larceny* was complete, and recommended a reduction of the sentence. A distinction, it seems, was taken between stealing from the person and a simple larceny; and all that the case holds to the benefit of this plaintiff in error is that such an act is not a stealing from the person. As above stated, he is not indicted for stealing from the person, but for feloniously stealing, taking and carrying away this property against the form of statute in such case made and provided. (2 R. S., p. 679, § 63.) And the judgment of the court, sentencing him to State prison for a term of five years, is in accord with the statute as to the punishment for the offence for which he was indicted.

Moreover, in *Regina* v. *Simpson* (Dearsly Crown Cases, 421), which was a case of stealing from the person, JERVIS, C. J., questioned the case of *Rex* v. *Thompson* (*supra*), saying that he thought that the minority of the judges there were right; but that the majority might have thought that

the outer coat which covered the pocket formed a protection to the pocket-book. And ALDERSON, B., said there must be a removal of the property from the person; but a hair's breadth will do. *Regina* v. *Simpson* (*supra*) was larceny of a watch. The owner carried it in his waistcoat pocket, with one end of a chain attached to it, and the other end through a button-hole of the waistcoat, and there kept by a watch-key. The prisoner took the watch out of the pocket and forcibly drew the chain through the button-hole. His hand was then seized by the owner's wife; and it appeared that the point of the key had caught on the button of another hole, and was thereby suspended. It was contended that the prisoner was guilty of an attempt only. But the court thought that, as the chain had been removed from the button-hole, the felony was complete. The watch was temporarily, though for a moment, in his possession, it was said. Like this was *Lapier's Case* (1 Leach Crown Cases, 320), who, snatching at a diamond ear-ring in a lady's ear, it was torn therefrom, but was found caught in the curls of her hair. He was found guilty of robbery from the person, for the ear-ring was in his possession for a moment, separate from the lady's person. And in *Commonwealth* v. *Luckis* (99 Mass., 431), which was an indictment for an attempt to steal from the person, the prisoner asked an acquittal on the ground that the larceny was complete, and so she could not be convicted of an attempt only. She was seen by a police officer with her hand in the pocket of another. He seized her wrist while her hand was there. She threw up her arm and tore the dress, so that the pocket and pocket-book fell to the ground. There was no evidence that her hand was on the book. The judge charged that if she was arrested in her attempt before her hand reached or disturbed the book, she might be convicted of an attempt; but if her hand had reached or seized the pocket-book, and she altered the position of it in the attempt to secure or retain it, this would be such a caption or asportation as would acquit the defendant; and she was convicted. On exceptions taken to the charge, the court above held:

That to justify a conviction, it was necessary to show that she failed in the perpetration of the offence of stealing from the person, which could be complete only when the property was in her full custody or control. It was not indeed, the court said, necessary that the pocket-book should be removed from the pocket, if once within the grasp of the thief, to constitute larceny. But the prisoner must, for an instant, have had perfect control of the property.

To constitute the offence of larceny, there must be a taking or severance of the goods from the possession of the owner. (2 Russ. on Crimes, p. 152, margin 6.) But possession, so far as this offence is concerned, is the having or holding or detention of property in one's power or command. It is the sole control of the property, or of some physical attachment to it; as in the *Case of Wilkinson* (1 Leach, 321, note *a*), where one had his keys tied to the strings of his purse in his pocket, which the prisoner attempted to take, and had the purse in his hand, but the strings of the purse still held to the pocket by means of the keys. This was held to be no asportation; for the purse could not be said to be carried away, as it still remained fastened to the place where it was before. And so, where goods in a shop were tied by a string to a counter, a thief took up the goods and carried them to the door, as far as the string would let him, and was there stopped. This was held no felony. (2 East Crown Law, 556.) Here was an actual, physical connection of the goods to the person or to the other property of the owner; and the complete carrying away was thwarted, not by the animate, forcible act of the owner taking back that which had for the instant passed from his control, but by the inanimate, self-acting detention of that which held it to the person or to the realty. That needed first to be severed before there could be a carrying away. (And see *Philips' Case*, 4 City Hall Recorder, 177.)

In *Rex* v. *Thompson* (*supra*), however, and in *Luckis' Case* (*supra*), as put in the charge and in the opinion, by the raising of the book out of the pocket of the owner, or by the

grasp and movement of it in the pocket, the owner was held to have lost that control of it which is possession, so that the felonious act of larceny was complete. There was no fastening there to be severed. It needed forcible action by him to retake it. Mere quiescence would not do it. Without that action, with the book in the grasp of the thief possessing it, controlling it and carrying it away, it would have been beyond recaption by him. So in the case here. The hand of the plaintiff in error was about the book, controlling it and taking it away; indeed, had taken it away (as in *Walsh's Case*, *supra*), every part of it, from the space which that part had occupied before his touch. It was in his possession. He directed, and, for the instant of time, controlled its movements. No inanimate, physical thing hindered him. Bull, for that instant of time, did not control or possess it; but, feeling him raising the book, threw up his own hand, pressed the book, caught it as it was going, and regained control and possession of it. But for this action it would have been taken entirely away. Who then, for that instant, controlled it and had it in possession?

There is no essential distinction in the cases. In *Rex* v. *Thompson* (*supra*) and in this case, as in the cases of the watch and of the ear-ring, there was a temporary possession by the larcenor, though but momentary.

There was a sufficient *asportavit*.

The judgment of courts below should be affirmed.

All concur.

Judgment affirmed.

Statement of case.

THE PEOPLE ex rel. CHARLES J. HAYDEN et al., Respondents, *v.* THE COMMON COUNCIL OF THE CITY OF ROCHESTER et al., Appellants.

THE CITY OF ROCHESTER, Appellant, *v.* CHARLES J. HAYDEN et al., Respondents.

A statute cannot be held unconstitutional or defective where it may be completely executed without any violation of a constitutional provision, or any further action by the legislature.

The provisions of the act entitled "An act in relation to the erection of public buildings for the use of the city of Rochester," which provides that the commissioners to be appointed thereunder shall select, as a site for a city hall, either certain lands therein mentioned owned by the city, or some other piece of land in said city which they may deem suitable (Laws of 1872, chap. 219, §§ 3, 4), is not violative of the provision of the Constitution which prohibits the taking of private property for public use without compensation (State Const., art. 1, § 7), as under it the commissioners may select lands owned by the city; and such lands can be taken for the purposes of the act, without any provision for compensation.

The selection and procuring a site for the contemplated buildings are necessary steps toward the erection thereof, and are embraced in the subject expressed in the title of said act.

The insertion of this provision, therefore, in the act does not render it repugnant to the constitutional provision prohibiting the passage of a local or private act embracing more than one subject, and that to be expressed in its title. (State Const., art. 3, § 16.)

(Argued December 11, 1872; decided December 17, 1872.)

THE matter first entitled is an appeal from order of the General Term of the Supreme Court in the fourth judicial department, reversing certain proceedings of the common council of the city of Rochester in relation to the erection of a new city hall in said city, which proceedings were brought up for review by writ of certiorari. The second is an appeal from judgment of said General Term, entered upon an order affirming an order of Special Term sustaining a demurrer to the complaint.

Prior to April, 1872, the common council of the city of

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Rochester had commenced proceedings for the erection of a city hall in that city. A lot was purchased by the city in the rear of the court-house, upon which, in January, 1872, the common council, by resolution, decided to erect the proposed building. A building committee was appointed, who entered into a contract and commenced the work. The assignee of the contractor subsequently surrendered the contract to the relators.

On the 12th April, 1872, an act was passed by the legislature (chap. 219, Laws of 1872), authorizing the appointment of commissioners to select a site for a city hall, and cause such hall to be erected. In pursuance of that act relators were appointed such commissioners. They selected as the site the lot purchased by the city for that purpose, made and recorded their certificate to that effect, and transmitted a copy to the common council, with a request that an ordinance should be passed setting apart the site so selected in perpetuity for such city hall, as required by section 3 of said act. The common council laid the communication on the table and failed to pass the ordinance as required by the statute. The building committee refused to recognize the authority of the commissioners and threatened to go on with the work, whereupon a writ of certiorari was issued on the prayer of the relators and an injunction obtained against the common council.

The commissioners then took possession of the premises and proceeded with the work, and demanded of the mayor and treasurer the issue of bonds under the act above referred to at chap. 219 and under chap. 771, Laws of 1872. Some bonds were issued and disposed of. The action second above entitled, was then commenced in the name of the city corporation against the commissioners, the mayor, and treasurer, setting forth the facts, alleging the acts referred to, under which defendants claimed to act, were unconstitutional and void, and asking that defendants be restrained in issuing and disposing of bonds or of the avails of those already disposed of.

Defendants demurred on the grounds, 1st. That it appears

that another action was pending between the parties for the same cause. 2d. That the complaint does not state facts sufficient to constitute a cause of action.

George F. Danforth for the appellants. The writ of certiorari should have been dismissed, there being a misnomer of the appellants. (Charter Laws of 1861, chap. 143.) The city is authorized to purchase such real estate as the purposes of the corporation may require. (Laws 1861, chap. 142, § 3; Laws 1850, chap. 536, § 139; Laws 1851, chap. 380, p. 761, § 12; Laws 1852, chap. 218, p. 296; Laws 1854, chap. 248, p. 562, § 9; *Ketchum* v. *Buffalo*, 14 N. Y., 356; *Peterson* v. *Mayor*, 17 id., 450; *Meech* v. *Buffalo*, 29 id., 216.) Chapter 219, Laws of 1872, is unconstitutional, and does not take away the power of the city to purchase real estate. (Cooley Const. Lim., 238; *Gorgon* v. *San Francisco*, 18 Cal., 590; *Montpelier* v. *Montpelier*, 29 Vt., 72; 27 id., 704; *Commonwealth* v. *Hutching*, 5 Gray, 485; *Campau* v. *Detroit*, 14 Mich., 272.)

Henry R. Selden for the respondents. The act of April 12, 1872, chap. 219, Laws 1872, does not conflict with the provisions of the Constitution. (Sedg. on Const. Law, 482; Cooley on Const. Law, 2d ed., 182; *Ex parte McCollum*, 1 Cow., 564; *Morris* v. *The People*, 3 Den., 394.) It contains but one subject, and that is expressed in its title. (*Brewster* v. *City of Syracuse*, 19 N. Y., 116; see also *Conner* v. *Mayor*, *etc.*, *of N. Y.*, 5 N. Y., 285; *The People* v. *McCann*, 16 id., 58; *Litchfield* v. *Vernon*, 41 id., 123; *The People* v. *Supervisors of Chautauqua*, 43 id., 10; *The People* v. *Lawrence*, 36 Barb., 190, 191; Cooley on Const. Law, 144, 145, per JEWETT, Ch. J.; *Stief* v. *Hart*, 1 Comst., 30; *Livingston* v. *Harris*, 11 Wend., 340; 1 Kent's Com., 464.) The act of April 12, 1872, supersedes the powers of the common council, if they had any, and vests them in the commissioners, and is valid and effectual. (*Harrington* v. *Trustees of Rochester*, 10 Wend., 547; *Dexter Plank-road Co.* v. *Allen*, 16 Barb., 15;

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Bowen v. *Lease*, 5 Hill, 221, 225 and note *a*; *Daviess* v. *Fairbairn*, 3 How. U. S., 636; *The People* v. *City of Brooklyn*, 5 Albany Law Jour., 337; *People* v. *Flagg*, 46 N. Y., 401; *Darlington* v. *Mayor, etc.*, 31 id., 164, 193–196; *The People* v. *Draper*, 15 id., 532; *Wynehamer* v. *The People*, 13 id., 430; Cooley on Const. Law, 191–193; *The People* v. *F. and B. Plank-road Co.*, 27 Barb., 445, 449, 450; *The People* v. *Pinckney*, 32 N. Y., 377, 393, 394; *The People* v. *Batchelor*, 22 id., 138; *Brewster* v. *City of Syracuse*, 19 id., 118.) Municipal corporations have such powers as are expressly given them by statute, and such as are necessary to the exercise of the powers so given. (1 R. S., 600, § 3; *Hodges* v. *The City of Buffalo*, 2 Den., 110; *Halstead* v. *The Mayor, etc., of N. Y.*, 3 N. Y., 433; S. C., 5 Barb., 218, 224; *McCullough* v. *Moss*, 5 Den., 567; *Scott* v. *Onderdonk*, 14 N. Y., 9; *Ward* v. *Dewey*, 16 id., 519–525; *Crooke* v. *Andrews*, 40 id., 547.) The writ of certiorari was properly directed to the common council. (City charter, §§ 36, 57; *Starr* v. *Trustees of Rochester*, 6 Wend., 564; *Bogart* v. *The Mayor, etc., of the City of New York*, 7 Cow., 158; *People ex rel. Gambling* v. *Cholwell*, 6 Abb. Pr., 161; *People* v. *Board of Assessors*, 39 N. Y., 81; *People* v. *Board of Police*, 39 id., 506.) The city of Rochester cannot maintain this action. (*Petty* v. *Tooker*, 21 N. Y., 267; Laws 1870, chap. 151; *Sherwood* v. *Conolly*, 35 How. Pr., 124; *Attorney-General* v. *Utica Ins. Co.*, 2 John. Ch. R., 371.) An action to try the title to office between different claimants is brought by the attorney-general under section 431 of Code. It is an action in the nature of a *quo warranto*. (*People* v. *S. and R. R. Co.*, 15 Wend., 113; *Berrian* v. *Methodist Society*, 4 Abb. Pr., 424; *People* v. *Sampson*, 25 Barb., 254; *People* v. *Attorney-General*, 22 id., 117; *Parish of Bellport* v. *Tooker*, 28 id., 256; *The Mayor of New York* v. *Conover*, 5 Abb. Pr., 171; *People* v. *Draper*, 15 id., 532; *People* v. *Ryder*, 12 id., 433; *Doolittle* v. *Supervisors of Broome Co.*, 18 id., 159–163; *People* v. *Corporation of New York*, 3 Johns. Cases, 79; *Hartt* v. *Harvey*, 32 Barb., 55; *People* v. *Kip*, 4 Cow., 282;

People v. *Tibbits*, 4 id., 358; *Tyack* v. *Brumley*, 1 Barb. Ch., 519; *People* v. *Conover*, 6 Abb. Pr., 220.) The question of title to a public office can only be tried in an action brought directly for that purpose. (*People* v. *Sampson*, 25 Barb., 254; *Tappan* v. *Gray*, 9 Paige, 507; S. C., 7 Hill, 259; *Howe* v. *Deuel*, 43 Barb., 504; *People* v. *Mattier*, 2 Abb. Pr. [N. S.], 289; *People* v. *Draper*, 4 Abb. Pr., 333; *Hughes* v. *Parker*, 20 N. H., 58; *Mayor of N. Y.* v. *Conover*, 5 Abb. Pr., 174; *People* v. *Stevens*, 5 Hill, 616, and cases there cited and note; *People* v. *Hills*, 1 Lans., 206; *Updegraff* v. *Crans*, 47 Penn. St., 103.)

GROVER, J. The misnomer of the appellant claimed by the counsel was no ground for the dismissal of the writ. (Code, § 173.) The defendants had appeared and made return of all the proceedings required by the writ, and the variance in the name of the corporation was rightly disregarded. It is not material to inquire whether the common council had power to adopt a site and erect a hall for the use of the city or not, for if it had such power, it was still competent for the legislature to substitute another agency for that purpose. The question in the case is whether chap. 219, vol. 1, 562, Laws of 1872, is a constitutional and valid statute. It is insisted that sections 3 and 4 of the act are not so, and that if not, no part of the act can be executed, and the entire act is therefore a nullity. Section 3 provides that the commissioners who were to be appointed by the mayor shall select as a site for said city hall, either the piece of land owned by said city in the rear of the court-house in said city, or some other piece of land in said city which said commissioners may deem suitable. That they shall make a certificate stating the site so selected by them, and containing an accurate description thereof, which shall be signed by them, or a majority, and acknowledged and recorded, as deeds of real estate are required to be, in the office of the clerk of Monroe county; and further, that if the site selected shall be a piece of land owned by the city, the commissioners shall transmit to the common council of the

city their certificate, and that the common council shall within two weeks after its receipt pass an ordinance setting apart in perpetuity for the said city hall the site so selected. Section 4 provides that upon the site so selected the commissioners shall cause to be erected, etc., and ready for use said building, etc. Other sections of the act provide for raising money to enable the commissioners to perform the duties enjoined. No provision is made by the act for compensation to the owner of the land selected, and for this reason it is insisted that sections 3 and 4 violate section 7, art. 1 of the Constitution, and are void for that reason. The argument is that section 3 authorizes the commissioners to select any piece of land in the city limits for the site, and that under this power they may select land not owned by the city, and that section 4 requires them to erect the building upon the site selected. That in case of the selection of a site not owned by the city, the act authorizes the land so selected to be taken for public use without making compensation. It is true that, in case of such a selection, and the owner was unwilling devote it to the public for that purpose, the commissioners could go no further. In that event, the act would have been fatally defective, and nothing more could have been done under it until provision for compensation was made by the legislature. But such a selection was not made. The commissioners did in fact select a piece of land owned by the city, and no question is or can be made but that this land may be used for the purpose of the act in the absence of any provision for compensation. (*Darlington* v. *The Mayor*, 31 N. Y., 164.) It follows that, in the event which has actually happened, the act may be completely executed without any violation of the section of the Constitution above referred to, or any further action by the legislature. Under these circumstances, sections 3 and 4 of the act cannot be held unconstitutional or the act defective.

It is also insisted that the title of the act does not comply with the requirement of section 16, article 3 of the Constitution. That section provides that no private or local bill which may be passed by the legislature shall embrace more than one subject,

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and that shall be expressed in the title. The act in question is local, and therefore void, unless the title conforms to the requirements of this section. The title is as follows: "An act in relation to the erection of public buildings for the use of the city of Rochester." The objection is that by it no reference is made to procuring sites for such buildings. But buildings can no more be erected without sites than without materials or means to defray the expense. All these are details, and no reference thereto in the title is required. The act in all its parts may and will, with the site selected, be fully executed without any violation of the Constitution.

The judgment appealed from must be affirmed.

All concur.

Judgment affirmed.

JOHN E. DEVELIN, Appellant, *v.* ABRAHAM B. COLEMAN, Respondent.

The firm of C. & S. were liable as principals upon certain drafts held by M. C. Defendant was liable thereon as surety. M. C. brought suit upon the draft against all the parties thereto. S., who had assumed the liability of the firm of C. & S., entered into a contract with defendant by which defendant was to provide for and take up the drafts in the first instance, but S. was eventually to pay them and save defendant harmless therefrom. Before the making of this agreement plaintiff had promised to indorse the notes of S. for the purpose of settling the suit. He was fully apprised of the agreement. Defendant paid the drafts and settled the suit. Plaintiff in ignorance of that fact indorsed the notes of S., payable to the order of M. C., and delivered them to defendant for the purpose of taking up the drafts. Defendant procured the indorsement of M. C. thereto and transferred them to a *bona fide* purchaser. In an action for the conversion of the notes,—*Held*, that as the purpose for which plaintiff indorsed and delivered the notes to defendant was not accomplished by them, the latter acquired no title to them; that he had no right to use them as security for what he had before paid for S., and was therefore liable.

(Argued December 13, 1872; decided December 17, 1872.)

Statement of case.

APPEAL from judgment of the General Term of the Court of Common Pleas for the city and county of New York, affirming a judgment in favor of defendant, entered upon the report of a referee.

This action was brought to recover damages for the alleged conversion of certain promissory notes, indorsed by plaintiff and delivered by him to defendant.

Charles A. Stetson and Robert B. Coleman were formerly proprietors of the Astor House, in New York, under the firm name of Coleman & Stetson. They failed in May, 1856. There was then outstanding four drafts drawn by defendant upon and accepted by Coleman & Stetson, which were held by Moses Chamberlain, Jr. The drafts were drawn for the accommodation of Coleman & Stetson.

In August, 1856, Chamberlain brought suit upon the drafts against drawer and acceptors.

In October, 1856, defendant proposed to Chamberlain that he should take the notes of Stetson indorsed by plaintiff in settlement of the suit and payment of the drafts. To this, Chamberlain assented. Defendant advised plaintiff that Chamberlain so agreed. Plaintiff agreed to procure Stetson's notes and to indorse them for the purposes named.

On the 27th March, 1857, an agreement was entered into between Stetson, who had assumed the liabilities of the firm, and the defendant, the substance of which, as far as relates to the matter in controversy, is set forth in the opinion.

Plaintiff was the son-in-law and the attorney and legal adviser of Stetson, and aided in perfecting the arrangement resulting in said agreement, and was cognizant of its contents.

In April, 1857, plaintiff procured Stetson's notes, payable to the order of Chamberlain, indorsed them and delivered them to defendant, for the purpose of paying the drafts and settling the suit; but before this defendant had settled the suit and paid the drafts by the transfer of certain real estate and by his firm note, Chamberlain declining to accept the notes proposed. Of this fact plaintiff was ignorant when he delivered the notes to defendant. Defendant procured the indorse-

ment of Chamberlain to the notes and transferred them for value before maturity. Other facts appear in the opinion.

The referee found as conclusions of law that defendant did not convert the notes, but applied them substantially to the uses and purposes intended, and that plaintiff had sustained no damage or loss from his acts. He thereupon directed judgment for defendant, which was entered accordingly.

Henry H. Anderson for the appellant. Defendant's appropriation of the notes was an abuse of the lawful possession, and amounts to a conversion. (Story on Agency, §§ 214, 217, *c*; *Conkey* v. *Bond*, 34 Barb., 276; id., 36 N. Y., 427; *Evans* v. *Kymer*, 1 Barn. & Adolph., 528; *Wolfe* v. *Brouwer*, 5 Robt., 601; *Murray* v. *Burling*, 10 John., 172; *Decker* v. *Matthews*, 2 Kern., 313.) Plaintiff is now entitled to recover the amount paid by him. (*Decker* v. *Matthews*, 2 Kern., 313.)

Francis O. Barlow for the respondent. There was no diversion or conversion of the notes. (*Rochester* v. *Taylor*, 23 Barb., 18; *Mohawk Bank* v. *Carey*, 1 Hill, 513, and opinion of BRONSON, J.; *Bank of Rutland* v. *Buck*, 5 Wend., 66; *Purchase* v. *Mattison*, 2 Robt., 71; *Grandin* v. *Leay*, 2 Paige, 509; *Moore* v. *McKibbin*, 33 Barb., 246.) The facts found will not justify an action on the case for a deceit. (*Geddes* v. *Pennington*, 5 Dow, 159; *Green* v. *Gordon*, 4 Scott New R., 13; 1 Story Eq. Juris., § 198, note; Parsons on Contracts, 4th ed., 267, 268.)

GROVER, J. The plaintiff insists that the referee erred in his legal conclusion that upon the facts found he was not entitled to recover. That from these facts it appears that the defendant converted the notes to his own use by tranferring them to a *bona fide* purchaser, thereby making the plaintiff liable to pay the amount. This depends entirely upon the further question, whether the notes, at the time of the delivery thereof by the plaintiff to the defendant, became valid securi-

ties in the defendant's hands against the plaintiff. If they did, the defendant had the right to procure the indorsement of Chamberlain and transfer the same at his pleasure, and such transfer would give the plaintiff no right of action for their conversion. If they did not upon delivery by the plaintiff to the defendant become valid obligations in his hands, he acquired no title, and the subsequent transfer by him to purchasers in good faith, thereby making the plaintiff liable for the payment thereof, was an unlawful conversion by the defendant, and rendered him liable to the plaintiff for the damages thereby sustained. (*Decker* v. *Mathews*, 12 N. Y., 313, and cases cited.) The facts found show that, independent of the agreement of the 27th of March, 1857, between Stetson and the defendant, Coleman & Stetson were primarily liable for the payment of the drafts held by Chamberlain, and that the defendant was liable thereon as surety for them. The first inquiry is whether their relations were changed, and how, by that agreement. By that Stetson, who had assumed the liability of the firm of Coleman & Stetson, agreed to pay the drafts in question, and save the defendant harmless therefrom. By the same agreement the defendant agreed to give to Chamberlain his bonds for the amount of said drafts, payable in five years, with semi-annual interest, secured by a mortgage or trust conveyance of certain specified property as collateral security for the amount of said drafts thereupon delivered up by said Chamberlain, or make such other arrangement for the security or discharge of said notes as may be satisfactory to Chamberlain, and as the defendant may elect, and against which and all cost and expense thereon Stetson, upon performance of the agreement by the defendant, agreed to indemnify and save him harmless. The meaning of these provisions, it will be seen, is a little obscure, but I think, aided by the surrounding facts, the true intention of the parties can be made apparent. The firm of Coleman & Stetson was liable as principals for the payment of these drafts. This liability Stetson had assumed as to Coleman. Stetson had failed, and was then unable to pay the drafts. There was then a suit pending

thereon, which would soon terminate in a judgment and execution, which would be disastrous to Stetson, as he was keeping the Astor House. The object of the agreement appears to have been to avoid this result by the defendant's either paying or securing the drafts, and, in case of the latter, procuring an extension of the time of payment, the length of which only appears from the time specified for which the bonds given by the defendant were to run, and in either event the primary liability of Stetson for the payment of the drafts was to be preserved. The latter object was secured by the provision for the indemnity of the defendant by Stetson. Of the provisions of this agreement the plaintiff was fully apprised. He was not liable upon the drafts. The finding of the referee does not show whether the promise of the plaintiff to indorse the notes of Stetson, for the purpose of settling the suit brought by Chamberlain upon the drafts, was made before or after this agreement between Stetson and the defendant, but the evidence shows clearly that it was before. Thus it will be seen that the effect of the agreement was to impose upon the defendant an obligation as to Stetson to either pay the drafts in the first instance or to procure an extension of the time of payment by giving security to Chamberlain for future payment, relying upon the agreement of Stetson to indemnify him, and thus prevent the recovery of a judgment, etc., by Chamberlain. Whether the defendant would be able to or would effect this, might have been somewhat uncertain. When he paid the drafts in hand and his note, to Chamberlain, he was performing this agreement with Stetson. The referee finds that he did so in reliance upon the promise of the plaintiff to procure and indorse the notes of Stetson for the purpose of settling the suit and getting up the drafts. But how he could have relied upon this promise made before the making of the agreement, after he had thereby assumed the obligation to prevent the recovery of a judgment in the suit, it is a little difficult to perceive, as is also how the performance of this agreement with Stetson should give him a right to enforce the promise of the plaintiff to procure and indorse the notes.

Opinion of the Court, per GROVER, J.

The learned referee in his opinion says that a large discretion in settling the suit was given to the defendant, but this was in the mode of performing the agreement with Stetson, and to this plaintiff was not a party. He did not make the defendant his agent with any discretionary power. All he did, upon being told by the defendant that Chamberlain would take the notes of Stetson indorsed by him in settlement of the suit, was to promise that he would give such notes for that purpose. This did not constitute the defendant the agent of the plaintiff. When on the second of April the plaintiff indorsed the notes and delivered them to the defendant, it was for the purpose, or at least one of the purposes, was to settle the suit of Chamberlain, and thus prevent the speedy recovery of a judgment in that suit. This had already been accomplished. Of this the plaintiff was ignorant. In this change of condition, it was for the plaintiff to determine whether he would become surety to the defendant for Stetson's debt. He had never promised this, and by doing this no suit would be settled, for there was none pending. It is insisted by the counsel for the defendant that he, having paid the drafts as surety for the principal debtors, was subrogated to rights of the holder, and therefore entitled to continue the action. However that might have been in the absence of any agreement with Stetson, that would have precluded him from so doing. Making the payment was one of the alternate things he had thereby undertaken to do, and his remedy for making it was an action upon the agreement. It is also insisted that the notes were used so as to accomplish the entire object of the plaintiff in giving them, and that they were therefore valid in the defendant's hands, although such object was accomplished in a mode somewhat different from that intended by the plaintiff. The legal conclusion is correct, but the fact assumed, upon which it is based, is not so. One object of the plaintiff was to settle and stop the further prosecution of the suit upon the drafts. The notes were not used for, nor did they accomplish any such purpose. That had been effected before they were given. The defendant

claimed to use them as security for a payment made in performance of his agreement with Stetson. The plaintiff never agreed to become surety for Stetson upon that agreement.

It is also insisted that the plaintiff sustained no damage by the course taken by the defendant, as he would have been equally liable upon the notes had they been delivered by the defendant to Chamberlain upon a settlement of the suit. The answer to this is that had he known that the suit had been settled by the defendant in pursuance of his agreement with Stetson, he would not have indorsed the notes and would not become liable at all. It was for him to determine whether he would become the surety of Stetson upon his promise to indemnify the defendant for paying the drafts. It is enough that it does not appear that he intended or agreed to do this. My conclusion is that the purpose for which the plaintiff indorsed and delivered the notes to the defendant, never having been accomplished by them, the defendant acquired no title to them. That he had no right to use them as security for what he had before paid to Chamberlain on account of Stetson, and therefore the defendant was liable for a conversion by transferring them to a *bona fide* purchaser, thus making the plaintiff liable for their payment.

The finding of the referee, that the defendant did not by withholding information from the plaintiff that he had already settled the suit with Chamberlain intend to perpetrate any fraud upon him, is not material. Had this information been given, and the plaintiff had then indorsed and delivered the notes for the purpose of becoming surety for Stetson to him for the payment he had made, he would have been bound by the indorsement.

It is also claimed that the plaintiff ratified the acts of the defendant by his subsequent receipt of the drafts as paid. But this receipt by him was as agent for Stetson, and for the purpose of delivering the same to him. This was no ratification. Evidence was given tending to show that the plaintiff assented to the transfer of the notes by the defendant, and some evidence in answer thereto that such assent was procured fraudulently.

Statement of case.

As the referee made no finding upon this evidence, I shall not determine as to the effect that should have been given to it.

The judgment must be reversed and a new trial ordered, costs to abide event.

All agree.

Judgment reversed.

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EDWIN HOYT et al., Appellants, *v.* PETER R. BONNETT et al., Executors, etc., Respondents.

The short statute of limitations (2 R. S., 89, § 38), by which one having a claim against the estate of a deceased person may be barred of his action and his claim forfeited, is penal in its character, and is to be strictly construed. To entitle an executor or administrator to the benefit thereof, the statute must in all essentials be complied with. His act in disputing or rejecting the claim must be decided unequivocal and absolute. Whatever may be the language or declaration, if in the same notice or declaration, or at the same time, he does or says anything from which the claimant may reasonably infer that the determination to dispute or reject is not final, the claim is not "disputed or rejected" within the meaning of the statute.

Plaintiffs presented to defendants, as executors of W., certain claims against the latter's estate. The latter caused to be served upon the former a written notice, stating in substance that as at present advised they declined to pay the claims, and stating that as they had no other means of information they would be greatly obliged if appellants would furnish them with a bill of particulars. The claims so presented were claims against two firms, in which defendants' testator had been a partner. At the time of the presentation no steps had been taken to collect these claims of the surviving partners or out of the partnership property. No action was commenced by plaintiffs within six months after the service of notice, nor did they make any offer to refer. In the account presented by defendants, upon their final accounting, plaintiffs' claims were omitted. They appeared and objected to the account upon that ground. The surrogate overruled the objections, passed the accounts, and decreed distribution without reference to plaintiff's claims. *Held*, error; that defendants had not disputed or rejected the claims so as to put the statute in operation, and the action was not barred; also, *held*, that there was no absolute or certain debt

Statement of case.

due either at law or in equity from the estate of the decedent to plaintiffs at the time they exhibited their claims; that such claims did not constitute debts against the estate until the liability had become fixed by an inability to collect the same against the surviving partners, and that even if the claims had been rejected or disputed by the notice served, the statute did not then begin to run, and that the surrogate, instead of making a final distribution of the estate, to the exclusion of plaintiffs, should have made a reasonable provision for their claims by directing a sum sufficient to satisfy the claims, to be retained to be applied to the payment thereof when due.

(Argued December 12, 1872; decided December 17, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a decree of the surrogate of the county of New York, settling the accounts of respondents as executors. (Reported below, 58 Barb., 529.)

Augustus Whitlock, of the city of New York, died prior to September 20th, 1866, leaving a last will and testament, which was duly admitted to probate, and on the last mentioned day letters testamentary were issued by the surrogate of New York to respondents, Daniel B. Whitlock, Robert C. Gwyer and Peter R. Bonnett, the executors therein named. The testator was at the time of his death a copartner in the firm of Whitall, Le Fevre & Co., of Waterbury, Connecticut. He was also a copartner in a manufacturing corporation called Glenville Mills, Glenville, Connecticut. Hoyt, Spragues & Co., the appellants herein, who are commission merchants in the city of New York, had an account as factors and commission merchants with Whitall, Le Fevre & Co., for moneys advanced on woolens consigned to them by the testator's firm of Whitall, Le Fevre & Co., and on July 1, 1867, claimed a balance of account thereon of $507,501.65, against which they held cloth goods unsold amounting to about 270,000 yards in quantity, the proceeds of sale of which were applicable to the said balance of account. They had also an account for moneys advanced to the Glenville Mills, amounting, July 1st, 1867, to $5,115.21.

On April 4th, 1867, said surrogate of New York made an

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order directing the executors to give notice to creditors to present their claims, etc. Notice was published pursuant to said order requiring creditors to present their claims on or before October 11th, 1867.

On the 8th October appellants served notices of their claims against the estate under the aforesaid accounts. On November 9, 1867, the executors served on appellants a notice, of which the following is a copy:

"To HOYT, SPRAGUES & Co.: Gents.—You are requested to take notice that the executors, etc., of Augustus Whitlock, as at present advised, decline to pay your claims against the estate of Augustus Whitlock for $5,115.21, and for $507,601.65, presented to the attorneys for said executors, and filed with them on the 8th day of October, 1867. Having no other means of procuring information concerning the details of said claims, they will be greatly obliged if you will furnish them a bill of particulars containing the items of your accounts, the dates when contracted, and a list of the notes or other vouchers which you hold for the same.

"NEW YORK, *November* 9th, 1867.

"P. R. BONNETT,
"ROBERT C. GWYER,
"D. B. WHITLOCK,
"*Executors.*"

On June 11, 1869, the executors presented to the surrogate a petition for a final settlement of their accounts as executors. In the petition Hoyt, Spragues & Co. are named among the persons interested in the estate as "creditors, legatees, next of kin or otherwise."

The petition prayed for such order as should sufficiently indemnify and protect the executors, etc. Appellants were duly cited, as persons interested, to appear on the final accounting on July 19th, 1869. They appeared pursuant to the citation, and it then appearing that the executors had omitted their claim in the account, they duly objected to the account on the ground of such omission.

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It was claimed before the surrogate, on the part of appellants, first, that they were creditors of the estate, having a claim not yet liquidated and ascertained as to amount, but which would become liquidated and due after the consigned goods in their hands were sold; second, that the claim had never been so disputed or rejected as to be barred by statute for non-commencement of suit within six months after notice; and third, that no sufficient notice had ever been given by the executors to set the statute in motion.

The executors claimed that they were entitled to a decree for final accounting and distribution, without reference to the claim of Hoyt, Spragues & Co., on the ground that the claim was barred by the statute as a rejected claim, on which no such suit had been commenced within six months after its rejection.

The surrogate overruled the objections, and proceeded to pass the executors' accounts and to decree distribution, without reference to the claim of appellants.

Wm. Allen Butler for the appellants. Appellants' claim was not barred by the provisions of the Revised Statutes (§ 38, art. 2, chap. 6, part 2), as no part of the debt was due at the time of the supposed rejection of it. (2 R. S., 88, § 35.) The omission to present vouchers with their claim does not impair plaintiffs' rights. (1 R. S., 88, § 35.) The short statute of limitations did not apply, as no sufficient notice to present claims had been given in pursuance of the surrogate's order of publication. (2 R. S., 88, § 34; *Murray* v. *Smith*, 9 Bosw., 689; *Whitmore* v. *Foote*, 1 Den., 159; *Argall* v. *Smith*, 3 id., 435; *People* v. *Covell*, 18 Wend., 598; *Ely* v. *Carnly*, 19 N. Y., 496; *Beach* v. *Nixon*, 9 id., 36; *Tucker* v. *Tucker*, 4 Keyes, 136; *Dudley* v. *Mayhew*, 3 N. Y., 9; *Garcie* v. *Sheldon*, 3 Barb., 232; *Kidd* v. *Chapman*, 2 Barb. Ch., 414; *Barsalou* v. *Wright*, 4 Bradf., 164; *Elliot* v. *Cronk's Admins.*, 13 Wend., 35; *Reynolds* v. *Collins*, 3 Hill, 36; *Nat. Bank of Fishkill* v. *Speight*, 47 N. Y., 668; *Calahan* v. *McClure*, 47 Barb., 206; *Broderick* v. *Smith*, 3 Lans., 26.)

Opinion of the Court, per ALLEN, J.

The executors having failed to dispute or reject so as to extinguish and bar the claim, under the statute, it was error to adjudge it barred. (*Mages* v. *Vedder*, 6 Barb., 352; *Wilson* v. *Baptist Ed. Society*, 10 id., 308; *Disoway* v. *Bank of Washington*, 24 id., 60; *Curtis* v. *Stillwell*, 32 id., 353; *Andrews* v. *Wallege*, 17 How., 263; *Tucker* v. *Tucker*, 4 Keyes, 135.)

C. A. Peabody and *A. Wright, Jr.*, for the respondents. The notice to creditors was sufficient. (3 R. S., 5th ed., 175, § 39.) The notice served by the executors on appellants was a full and complete rejection of their claims within the spirit and intent of the statute. (3 R. S., 5th ed., §§ 40, 43, 176.) The claims were barred by the statute. (*Gibson* v. *Stanton*, 9 N. Y., 476; *Barsalou* v. *Wright*, 4 Bradf., 164.)

ALLEN, J. To entitle an executor or administrator to the benefit of the short statute of limitations, by which one having a claim against the estate of a deceased person may be barred of his action and forfeit his claim, the representative of the estate must, in all essentials, comply with the statute creating the bar. Neither the statute nor the acts of executors or administrators under it are to receive a liberal interpretation or to be extended by implication beyond their natural and ordinary import. With a single exception, courts and judges have regarded the act as penal in its character, and to be strictly construed. By the statute an executor or administrator at any time, at least six months after the granting of letters testamentary, or of administration, by notice published as prescribed by law, and as the surrogate may order, may require all persons having claims against the estate to exhibit the same, with the vouchers, at or before a day to be specified in the notice, at least six months from the day of the first publication. (2 R. S., 88, § 34.) Such notice was published by the executors in this case, and the present appellants exhibited their claim within the time limited by the notice. A subsequent section of the statute (§ 38) provides that if a claim be

exhibited to the executor or administrator, and "be disputed or rejected by him," and the same shall not have been referred, the claimant shall, within six months after such "dispute or rejection," if the debt or any part thereof be then due, or within six months after some part thereof shall have become due, commence a suit for the recovery thereof, or "be forever barred from maintaining an action thereon." Justice to the claimant, as well as the reasonable interpretation of the statute, requires that the act of the executor or administrator, in disputing or rejecting the claim which is to put the claimant to an action within the brief period prescribed, upon pain of forfeiting his claim, should not be ambiguous or equivocal, capable of two interpretations, but decided, unequivocal and absolute; such an act or declaration as will admit of no reasonable doubt that the claim is definitively disputed or rejected, so that the claimant will be without excuse for not resorting to his action within the time required to save his claim. To construe and apply the statute in a manner more liberal to the representatives of estates would make it a trap and a snare to claimants. They might be misled, and induced to remain passive until they had lost the right of action by a notice or a declaration so carefully drawn or made as to lull them to rest; while it might be claimed that an intention to dispute or reject the claim was clearly inferable from the language used. The rule is as fairly deducible from the authorities and the statute, upon a reasonable interpretation, that whatever may be the language or declaration of the executor or administrator to the claimant, if in the same notice or declaration, or at the same time, he does or says anything from which the claimant may reasonably infer that the determination to dispute or reject the claim is not final, but that it will be further examined or considered, either upon the vouchers already exhibited or such as may be thereafter presented, the claim is not "disputed or rejected," within the statute. (*Kidd* v. *Chapman*, 2 Barb. Ch. R., 414; *Reynolds* v. *Collins*, 3 Hill, 36; *Elliot* v. *Cronk's Administrators*, 13 W. R., 35; *Barsalou* v. *Wright*, 4 Bradf. R., 164.) The

notice of the executors to the present appellants does not advise the latter that the claims were either disputed or rejected. It merely advises them that, as at present advised, they declined to pay them. The ground of such declension is not stated, and the term employed is not equivalent to a refusal to pay; which the chancellor, in *Kidd* v. *Chapman* (*supra*), said, "if upon any other ground than that the debt, or some part of it, is not legally or equitably due, is not a disputing or rejection of the debt within the statute." From the nature of the claims, there may have been good reasons for declining to pay them, irrespective of their justice. Another paragraph in the same notice conveys the idea very distinctly that they decline to pay the claims at that time, not because they were deemed unjust, or not legal or equitable charges against the estate, and not to be paid at any time, but for some other reason. The executors say that, as they have no other means of information concerning the details of the claims, they will be obliged if the claimants will furnish them a bill of particulars, containing the items of their accounts, the dates when contracted, and a list of the notes with vouchers held for the same. This request is inconsistent and unreconcilable with the pretence that the claim was by the same notice rejected or disputed, and the claimants put to their action. To furnish vouchers and particulars of claims that were definitively rejected or disputed, and which the executors did not propose to examine or re-examine, would have been a work of supererogation which the executors could not have reasonably asked, and such as sensible business men would not have asked. The executors did not reject or dispute the claim so as to put the statute in operation, and bar the claims upon a failure to bring an action within the time prescribed by it.

Another insuperable objection to the bar set up by the respondents, and sustained by the surrogate, arises out of the character of the claims. The estate of the decedent was not primarily chargeable with them. The surviving members of the copartnership and the assets of the respective firms were previously liable for them with the other firm debts, and

the estate of the deceased partner could not be resorted to or charged until the remedies against the survivors and the partnership property had been exhausted, or it should appear that an effort to collect the debt from either would be fruitless.

It is well settled in this State that a creditor of a firm cannot proceed against the estate of a deceased partner without showing either that the surviving partners have been proceeded against to execution at law, or that they are insolvent. (*Lawrence* v. *Orphan House*, 2 Denio, 577, affirming the decree of the chancellor in the same case, 11 Paige, 80.) The doctrine has been reaffirmed by this court since the enactment of the Code; and the personal representatives of a deceased partner cannot be joined as a party defendant with the surviving partner in an action for a partnership debt when the complaint does not show the plaintiff's inability to procure satisfaction from the survivor. (*Voorhis* v. *Childs' Executor*, 17 N. Y., 354.)

There was no absolute or certain debt due, either at law or in equity, from the estate of the decedent, to the present appellants at the time they exhibited the claims. The liability was contingent; and while it was proper to present the claims, the statement as made, the truth of which is not controverted, fully disclosed the nature and character of the debts, and the conditions and extent of the liability of the estate. The claims were not, and, so far as appears, are not now an absolute charge upon the estate of Mr. Whitlock; but the contingent liability continues, and cannot be disregarded or rejected by the executors. They do not constitute debts against the estate until the liability has become fixed and certain by an inability to collect the same from the surviving partners. Even if it should be conceded that the claims were rejected or disputed by the notice from the executors of November 9, 1867, the time for commencing the actions has not commenced running, for the reason that, so far as the case shows, the debts have not become due as against the estate; but the claims still exist as contingent,

with the possibility of becoming absolute charges upon or debts against the estate for the whole or some part thereof. The surrogate should not have made a final distribution of the estate to the exclusion of the appellants. If, after making reasonable provision for their claims, there was a surplus capable of distribution, that surplus might have been apportioned and paid to those entitled. The statute (2 R. S., 96, § 74) directs the surrogate, if it shall appear that any claim exists against the estate of the deceased which is not due, to allow a sum sufficient to satisfy such charge, or the proportion to which it may be entitled, to be retained to be applied to the payment of the same when due, or when recovered, or of being distributed according to law. These claims are within the letter as well as the spirit of the statute. The decree of the surrogate, as well as the judgment of the Supreme Court, appear to have proceeded upon the theory that the claims of the appellants have been disputed or rejected by the executors, and so brought within the operation and effect of the short statute of limitations; and neither tribunal appears to have considered the fact that the debts were not due so as to require the commencement of an action within six months from the rejection.

The courts were in error in holding that the claims were rejected or disputed, and the judgment of the Supreme Court and decree of the surrogate must be reversed, as well for that reason as for the reason that the debts were not due as against the estate at the time of the hearing before the surrogate, and the statute had not run against them.

The proceedings must be remitted to the surrogate, to be proceeded with pursuant to law.

All concur.

Judgment accordingly.

Statement of case.

MARY ANN GRAHAM, Respondent, *v.* JAMES LINDEN, impleaded, etc., Appellant.

An order denying a motion for a reargument, which motion is based upon the ground that a justice who heard and decided the case below sat as a member of the court upon the hearing of appeal from the judgment, is appealable to this court.

Where the record shows that other justices heard and decided the case at General Term, this is not contradicted by proof that the justice before whom the case was tried, as presiding justice of the General Term, called the case when reached upon the calendar, and made some inquiries of counsel as to the papers.

The lien of a mortgage cannot be discharged in whole or in part by a tender of less than the whole amount due thereon. This rule is not affected by the fact that only a portion of the amount due belongs to the holder, and the balance to some other person for whom he holds the mortgage in trust.

G., the husband of plaintiff, in his lifetime executed a mortgage upon two lots of land, in which plaintiff joined. Subsequent to his death, plaintiff, as his administratrix, executed another mortgage thereon, pursuant to a decree of the surrogate, made upon the ground that the personal property was insufficient to pay the debts. Defendant, L., as grantee of the heir of G., had notice of the application to the surrogate, and appeared thereon. Plaintiff's dower in the two lots was admeasured to her in one of them. L. sold the lots to D., subject to the mortgages and the dower as admeasured, and D., sold the lot, no part of which was assigned for dower, to S., who assumed the mortgages and agreed to pay them. Plaintiff subsequently became owner of both mortgages. In an action to foreclose them,—*Held*, 1st. That defendant, L., was concluded by the decree of the surrogate as to amount of assets in plaintiff's hands as administratrix and the amount of deficiency, and that an offer to prove that plaintiff's resources for purchasing the mortgages came from moneys belonging to the estate was properly overruled. 2d. That plaintiff was liable to contribute toward the payment of the first mortgage to the extent of the interest upon one-third of the principal during her life; that S., was liable for the payment of the entire amount, and that defendant, L., was entitled to receive what the plaintiff was liable to pay.

(Argued December 18, 1872; decided December 24, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment

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in favor of plaintiff, entered upon the decision of the court at Special Term.

This action was brought to foreclose two mortgages, covering two lots of land situate in the city of New York, one of which was made by William Graham, the husband of plaintiff, in his lifetime, and the second by the plaintiff as administratrix of the estate of her husband, pursuant to a decree of the surrogate of the county of New York, entered agreeably to provisions of title 4, chap. 6, of part 1, of the Revised Statutes, the personal estate being insufficient, as alleged, to pay the debts of the deceased. Both mortgages, by several mesne assignments, became vested in the plaintiff. Before such assignments the plaintiff's dower in the premises was admeasured to her by decree of the Superior Court in the most northerly of the two lots covered by the mortgages.

Linden, who at the time of the granting the decree by the surrogate, and at the time of the admeasurement, was the assignee of the heir of Graham, had notice of the application to the surrogate and appeared thereon. He subsequently sold the lots to one Dunnigan, subject to the mortgages and to the dower as admeasured. Dunnigan sold the southerly lot to Jacob Schloss, who assumed the mortgages and agreed to pay them, and afterward sold the other lot to Linden, subject to the dower admeasured. Schloss tendered to plaintiff before the commencement of the action the amount of the mortgage, less what he claimed was the portion she was liable to contribute toward its payment. The court held that plaintiff, as tenant in dower, was liable to contribute to the payment of any portion of the mortgage first mentioned, which it became necessary to satisfy, out of the proceeds of a sale of the lot, in which dower was assigned; but was not bound to contribute if the mortgage was satisfied out of the other lot. The lot sold to Schloss was directed to be first sold, and if a deficiency arose then the balance to be sold, subject to plaintiff's estate in dower, and the moneys applied toward the deficiency, deducting a sum equal to the value of an annuity for the

residue of plaintiff's life upon one-third of said mortgage and interest. Judgment was entered accordingly.

H. Brewster for the appellant. Plaintiff's dower being subject to the first mortgage for $1,000, she was bound to contribute her fair proportion to its payment. (Lambert on Dower, 45, 46, and cases cited; *Leavenworth* v. *Conly*, 48 Barb., 570; *Titus* v. *Neilson*, 5 John. Ch., 452; *Swaine* v. *Perine*, 5 id., 482; *Everton* v. *Austin*, id., 497; *Collins* v. *Torry*, 7 John., 278; *Russell* v. *Austin*, 1 Paige, 195; *Coates* v. *Cheever*, 1 Cow., 461.) The tender discharged the lien. (*Hartley* v. *Latham*, 1 Keyes, 222; *Kortright* v. *Cady*, 21 N. Y., 343.)

Henry Morrison for the respondent. The decree of admeasurement of dower was binding on plaintiff, Linden, and his grantees. (2 R. S., Edm. ed., 513, § 17; *Graham* v. *Dunigan*, 2 Bosw., 517; *Laurence* v. *Brown*, 5 N. Y., 395; *Borst* v. *Griffen*, 9 Wend., 307; *Jackson* v. *Hixon*, 17 John., 123; *House* v. *House*, 10 Paige, 158; *McCabe* v. *Swap*, 14 Allen, 191.) A tender must be unqualified. A tender of the amount due, deducting the amount equitably, payable by plaintiff, was not a sufficient tender. (*Kortright* v. *Cady*, 21 N. Y., 343; *Wood* v. *Hitchcock*, 20 Wend., 47; *Roosevelt* v. *Bull's Head Bank*, 45 Barb., 584; *Roosevelt* v. *Harlem Co.*, 45 id., 554; 1 Camp. N. P., 183; *Eddy* v. *O'Hara*, 14 Wend., 221; *Brooklyn* v. *De Graw*, 23 id., 345.)

GROVER, J. The order of the General Term denying the defendant's motion for a reargument of the case must, if appealable to this court, be affirmed. I think it is an appealable order. Mr. Justice INGRAHAM, having heard and decided the case at the Special Term, was prohibited by the Constitution from sitting as a member of the court upon the hearing of an appeal from the judgment. If he did so, the appellant had an absolute right to have the order affirming the judg-

ment set aside, and the case reargued by a court authorized to hear and decide it. But the record shows what justices heard and decided the case, from which it appears that Justice INGRAHAM did not. The affidavit of the appellant does not in any way contradict this. The calling the case, upon its being reached upon the calendar (being presiding justice), was not improper; nor his making some inquiry of the counsel about the papers. The affidavit does not show that the conversation had by him with his associates in a low tone, after his return to the bench, had any relation to the case. So far from its showing that Justice INGRAHAM acted as a member of the court upon the hearing, it does not warrant a suspicion of his attempting to influence the action of those who did hear and decide it. The offer of evidence that the plaintiff's resources for purchasing the mortgages came from money she concealed during the life of her husband was properly overruled. In effect, it was an offer to prove that the determination of the surrogate of the amount of the assets in her hands as administratrix, upon the hearing of her petition for leave to mortgage the real estate, was erroneous. Upon that hearing, the surrogate had jurisdiction to determine that question; and his determination was conclusive upon the parties, of which the appellant was one. They could not avoid it in another proceeding by proving the falsity of the testimony upon which it was based. The lien of the mortgages was not discharged by the tender made. The sum tendered was less than the amount due upon the mortgages. Whether all that was due thereon belonged to the plaintiff or a part only, and the residue to some other person for whom the plaintiff held the mortgages in trust, does not affect the question. In either event, to discharge the lien the tender must be for the whole amount due upon the mortgage. There is no case holding that the lien may be discharged in whole or in part by a tender of less than the entire amount due.

The remaining question is whether the plaintiff was not herself liable for the payment of a part of the money due

upon the mortgage given by her husband and herself to Bronson. It is conceded that Schloss was liable for the payment of the entire amount, and that a judgment therefor was proper; but it is insisted that the appellant was entitled to a portion of the money, and that the judge erred in not adjudging this to be paid to him. The plaintiff, to entitle her to dower in the land covered by this mortgage, would be obliged to contribute to its payment. (Lambert on Dower, 45; *Leavenworth* v. *Cooney*, 48 Barb., 570; *Russell* v. *Austin*, 1 Paige, 195.) This mortgage covered two lots, and the plaintiff had had her dower in both assigned to her in one of the lots under proceedings instituted by her in the Superior Court for its admeasurement. The admeasurement made was the dower in both lots. The judge ordered the lot, no part of which was assigned to the plaintiff as dower, to be first sold; and held that if the proceeds of this were sufficient to pay the amount due upon the mortgage the plaintiff was entitled to the whole sum, free from any contribution by her; but if not sufficient, then the lot in which her dower was assigned should be sold; and, in that event, he held her liable to contribute to the payment of the mortgage. It is now sought to sustain the judgment as to the first mentioned lot, upon the ground that the plaintiff has no dower therein. It is true that no part of this lot was assigned to her; but that assigned in the other was in satisfaction for her right in both. So that, in fact, she has had her dower assigned for both, and her right thereto satisfied. This being done, she became liable to contribute to the payment of the mortgage to the extent of the interest upon one-third of the principal during her life. The appellant having acquired the title of the heirs conveyed the lot, no part of which was taken for the plaintiff's dower, and the purchaser, as part of the purchase-money, assumed the payment of the mortgage. This was the lot first directed to be sold. If the proceeds are sufficient to pay the mortgage it will then have been paid, in effect, by the appellant, and his right to call upon the plaintiff for contribution perfect, unless such right has been cut off by some means. It

is suggested that this was done by providing for the payment of the mortgage from the other lands in the admeasurement of dower. It is an answer to this, that no such provision could have been made in that proceeding.

Title 7, chapter 8, part 3, volume 2 of the Revised Statutes, prescribing this proceeding, confers no power upon the commissioners to make any provision for the payment of any incumbrance upon the land; and there was no evidence that they attempted any such thing.

There was no pretence of any agreement by the parties that the mortgage should be paid by the owner of the land not assigned for dower, or that the plaintiff should be discharged from liability to contribute to the payment of the mortgage. The legal conclusions of the judge show that he found that there had been no such discharge. Otherwise he would have directed the interest of the appellant in the lot in which dower was assigned to be sold for the payment of any deficiency after the sale of the other, and thus relieved the plaintiff from all liability for contribution.

The counsel for the respondent is right in the position that the admeasurement is binding and conclusive as to the location and extent of the dower upon all parties to the proceeding; and that, after this, the widow had no right of dower in the part not assigned to her. Her right therein was satisfied by the lands assigned. *McCabe* v. *Swap* (14 Allen, 188), relied upon by the counsel for the respondent, does not decide the question in this case. There the husband conveyed the land in his lifetime, and the purchaser, as part of the purchase-money, assumed the payment of the mortgage. This was, in effect, payment of the mortgage by the property of the husband. In this case, the provision for payment was from the property of the heirs after the widow's claim to dower therein had been satisfied by the assignment to her of other land in satisfaction thereof. This did not discharge the plaintiff from liability to contribute to the payment of the mortgage. Her purchase of the mortgage did not affect this liability. The lot directed to be first sold, being liable for the payment of

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the entire amount of the mortgage, was properly adjudged to be sold to produce that sum. The error was in awarding this entire sum to the plaintiff. The appellant was entitled to receive what the plaintiff was liable to pay on the mortgage. That is found by the judge to be $194.14.

The judgment should be modified by deducting this amount from the sum directed to be paid to the plaintiff from the proceeds of the lot first directed to be sold, with interest from the entry of the judgment, and directing the payment thereof to the appellant, and, as so modified, affirmed, without costs to either party upon either appeal.

All concur, except ALLEN, J., not voting. RAPALLO, J., not sitting.

Judgment accordingly.

THE PEOPLE ex rel. THE CITY OF ROCHESTER et al., Appellants, *v.* MARTIN BRIGGS et al., Respondents.

THE CITY OF ROCHESTER, Appellant, *v.* MARTIN BRIGGS et al., Respondents.

Every presumption is in favor of the validity of legislative acts, and they are to be upheld unless there is a substantial departure from the organic law.

In order to comply with that provision of the Constitution which declares that "no local or private bill which may be passed shall embrace more than one subject, and that shall be expressed in the title, (State Con., art. 3, § 16), it is not requisite that the most expressive title shall be adopted, nor will courts criticise too rigidly the details of a bill to find extraneous matter. The degree of particularity with which the title of an act is to express its subject, rests in the discretion of the legislature.

Where the title of a local or private act expresses a general purpose or object, all matters fairly and reasonably connected with it, and all measures which will or may facilitate its accomplishment, are proper to be incorporated in the act, and are germane to the title.

Where a local or private act embraces more than one subject, one of which is properly expressed in the title, all of the provisions of the act relating to the subject, not thus expressed, are invalid and will be rejected. But

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if the provisions relating to the subject expressed are in no way connected with or dependent upon the others, and if by striking out those others the residue of the act is complete in itself, sensible and capable of being executed, the act, with the void provisions eliminated, is valid and will be upheld. (GROVER, FOLGER AND PECKHAM, JJ., dissenting.)

It is unnecessary that a law, in order to operate as an amendment to a municipal corporation, should specify that it is an amendment to the charter or to any specific act. It is sufficient if the provisions affect the corporation in its governmental capacity.

The words, "the city of Rochester," in the title to the act entitled "An act to amend the several acts in relation to the city of Rochester" (Laws of 1872, chap. 771), signify the corporation of the city; the title expresses a subject, and that one comprehensive enough to embrace all the details of the city charter and government.

The provisions of the twentieth section of said act, which confirms the proceedings of the common council and authorizes a city railroad to lay its tracks upon the sides instead of the center of an avenue, are connected with the regulation of the streets of the city and are embraced in the subject expressed in the title, as are also the provisions of the twenty-fifth section conferring upon the water commissioners authority to contract with the trustees of the villages, through which the water to the city may be conducted, to supply the villages with water, and authorizing such trustees to levy the annual expense with their annual tax. The power to supply villages by contract is incidental to the main purpose of furnishing the city with water, and may serve as the means of attaining it; and the authority conferred upon the trustees to levy the tax is indispensable to render such a contract effectual. (CHURCH, Ch. J.; ALLEN and ANDREWS, JJ., concurring.)

The sections of said act, also, which are not specified as amendments in the act itself, are valid, and effectual as if thus specified.

(Argued December 11, 1872, decided December 24, 1872.)

APPEALS from judgments of the General Term of the Supreme Court in the fourth judicial department, entered upon orders affirming orders of Special Term, sustaining demurrers to the complaints, and directing judgments thereon.

The first action was in the nature of a *quo warranto*. The complaint alleged, in substance, that defendents claimed to be commissioners of public works of the city of Rochester, and by virtue of the act entitled "An act to amend the several acts relating to the city of Rochester" (chap. 771, Laws of 1872) threaten to and have usurped the exclusive care

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and control of the streets, avenues, etc., of the city, and had advertised for contracts for the improvement of Lake avenue, and for cleaning the streets of the city; that said act is unconstitutional. Judgment of ouster from the office claimed by the defendants was demanded, and that the common council and superintendent of streets of the city be declared to be entitled to all the powers and authority conferred upon them by the city charter prior to the passage of the act.

The object of the second action was to restrain the defendants from tearing up or interfering with the streets or sewers of the city, the complaint alleging that as "commissioners" as aforesaid defendants threatened to tear up and alter various streets, etc., of the city and to open new streets. The defendants demurred to both complaints upon the ground that they did not state facts sufficient to constitute causes of action.

G. F. Danforth for the appellants. Chapter 771, Laws of 1871, under which defendants claim to act, is unconstitutional and void. (State Const., § 16, art. 3; *The People* v. *The Supervisors of Chautauqua*, 43 N. Y., 11, 19, 20, 21, 22; *The People ex rel.* v. *Hills*, 35 id., 449, 451; *The People ex rel.* v. *The Commissioners of Highways of Palatine*, 53 Barb., 70, 74.) It is local in its character, and embraces more than one subject, and is defective in title. (*Corning* v. *Greene*, 23 Barb., 34; *Smith* v. *Helmer*, 7 id., 416; *People ex rel. McConville* v. *Hills*, 35 N. Y., 449; *Gaskin* v. *Meek*, 42 N. Y., 186; *People* v. *Allen*, 42 id., 404; *Bradley* v. *Stephens*, 41 id., 619, reversing same case in 2 Abb. [N. S.], 348, and cited in 42 N. Y., 188; *Sun M. Ins. Co.* v. *Mayor*, 8 N. Y., 253; 2 Iowa, 282; *Mayor, etc.*, v. *Colgate*, 2 Kern., 146.)

E. A. Raymond for the respondents. The whole of an act is not void because some of its provisions are not within the subject designated in the title, and are therefore unconstitutional. (*Philips* v. *Mayor of New York*, 1 Hilton, 483;

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Town of Fishkill v. *Fishkill and Beekman Plank-road Co.*, 22 Barb., 634; *The People* v. *Same*, 27 id., 445; *People ex rel. Crowell* v. *Lawrence*, 36 id., 177; *Matter of De Vencenne*, 31 How. Pr., 289, 343; *People* v. *O'Brien*, 38 N. Y., 193, 195; *Gaskin* v. *Anderson*, 55 Barb., 260; *Pullman* v. *Mayor of New York*, 54 id., 170; *Leavitt* v. *Thompson*, 56 id., 547; *Rockwell* v. *Nearing*, 35 N. Y., 302; *The People ex rel. Mitchell* v. *Lawrence*, 54 Barb., 589; *People* v. *McCann*, 16 N. Y., 58; *Williams* v. *The People*, 24 id., 405; *People* v. *Draper*, 15 id., 543; *Clark* v. *City of Rochester*, 24 Barb., 470; *People* v. *Wynehamer*, 3 Kern., 441; *Commonwealth* v. *Ketchings*, 5 Gray, 486; *Warren* v. *Mayor*, 2 id., 97; Cooley on Const., 78, 145; *Davis* v. *The State*, 7 Md., 151; *Phelps* v. *Covington*, 2 Metc. [Ky.], 219; *Morford v. Unger*, 8 Clarke [Iowa], 82; *O'Leary* v. *Cook*, 28 Illinois, 534; *Dunscomb* v. *Prindle*, 12 Iowa, 1; *Davis* v. *Bank of Fulton*, 31 Ga., 59; *Blood* v. *Mercelliott*, 53 Penn. St., 391; *Hines* v. *Cydelotte*, 29 Ind., 518; 7 id., 684; 25 Ill., 181.) The act in question does not embrace more than one subject, and that is expressed in its title. (*Sun Mut. Ins. Co.* v. *Mayor*, 4 Seld., 252, 253; *Conner* v. *Mayor*, 1 id., 285; *Brewster* v. *City of Syracuse*, 19 N. Y., 116; *People* v. *O'Brien*, 38 id., 193; *Litchfield* v. *Vernon*, 41 id., 125; *People* v. *Lawrence*, id., 139; *S. C.*, 36 Barb., 177; *Gaskin* v. *Meek*, 22 N. Y., 186; *People* v. *McCann*, 16 N. Y., 60; *Outwater* v. *Mayor*, 18 How. Pr., 572; *Sharp* v. *Mayor*, 31 Barb., 572; *People* v. *Hills*, 35 N. Y., 449; *Clarke* v. *City of Rochester*, 24 Barb., 471; *Mosier* v. *Hilton*, 15 Barb., 657; Cooley on Const., 142–144; 5 Lansing, 149; Potter's Dwarris on Stats., 100, 102, 103.) The part of the act relating to the commissioners of public works contains but one subject, which is expressed in the title. (*People* v. *Flagg*, 46 N. Y., 401.) Officers whose office has been created since the adoption of the present Constitution may be appointed in any manner the legislature may direct. (*Greaton* v. *Griffin*, 4 Abb. Pr. [N. S.], 315; *People* v. *Draper*, 15 N. Y., 532, 538; *People* v. *Acton*, 48 Barb., 524; *People* v.

Batchelor, 22 N. Y., 128; *People* v. *Woodruff*, 32 id., 364, 365.)

CHURCH, Ch. J. The first of the above actions is in the nature of a *quo warranto* to try the title of the defendants to the office of the commissioners of public works of the city of Rochester, and is based solely upon the ground that the act of the legislature, chapter 771 of the Laws of 1872, authorizing their appointment, is a violation of the 16th section of the 3d article of the Constitution of the State, which declares that "no private or local bill which may be passed shall embrace more than one subject, and that shall be expressed in the title," and is therefore void. The act in question contains thirty sections, and is entitled "An act to amend the several acts in relation to the city of Rochester." The first five sections relate to the collection of taxes, auditing accounts, public buildings and other miscellaneous city affairs. The sixth section purports to be an amendment of the 155th section of the consolidated act of 1861, and authorizes the mayor of the city of Rochester to appoint five electors and tax-payers of the city to constitute the commissioners of public works of the city of Rochester, and that and the fourteen subsequent sections relate generally to their powers and duties, and contain a variety of details designed to perfect the system, inaugurated by the act, of managing the improvements and public works of the city, and constitute the most important part of the act. Section 20 confirms the action of the common council in certain improvements in Lake avenue, and authorizes the street railroad track to be relaid on each side of said avenue instead of the center, under the direction of the common council. Section 21 is an amendment to an act passed April 12th, 1872, in relation to public buildings for the use of the city. The next six sections, to and including the 27th, relate to the board of water commissioners appointed under "An act to supply the city of Rochester with pure and wholesome water," passed April 27th, 1872.

The 25th section confers upon the water commissioners

authority to enter upon any public street, highway or railroad, in any of the villages or towns adjoining or in the vicinity of the city through which it may be necessary to conduct water to the city, and lay pipes, etc., therein, and requires that the consent of the trustees of such village or directors of the railroad shall be obtained, and if not obtained such right shall be acquired in the same manner as title to lands. It also authorizes the commissioners to contract with the trustees of any village through which the pipes are so laid, for the supply of such village with water, and in case any such contract is made, the village authorities to levy and collect the annual expense thereof with the annual tax of the village.

Section 28 amends another act in relation to the repair of specified streets, and section 29 repeals all acts or parts of acts inconsistent with this act, and section 30 declares that the act shall take effect immediately.

The provision of the Constitution invoked in this case was adopted to check and prevent certain evils of legislation, and should be enforced by courts whenever it has been substantially violated. Its object was twofold. First, to prevent a combination of measures in local bills, and secure their passage by a union of interests commonly known as "log-rolling." Second, to require an announcement of the subject of every such bill, to prevent the fraudulent insertion of provisions upon subjects foreign to that indicated in the title. It was intended that every local subject should stand upon its own merits, and that the title of each bill should indicate the subject of its provisions, so that neither legislators nor the public would be misled or deceived. (8 N. Y., 252.)

It is not requisite that the most expressive title should be adopted, nor should courts criticise too rigidly the details of a bill to find extraneous matter. Every presumption is in favor of the validity of legislative acts, and they are to be upheld, unless there is a substantial departure from the organic law.

Courts have no concern with the propriety or wisdom of legislation. That power has been committed by the Constitution to the legislative department of the government, and

with its exercise courts cannot interfere. They can only determine whether, in a given case, the legislature has exceeded its authority or violated any provision of the Constitution, and when this point is decided, their duty is performed.

Questions under this clause of the Constitution have frequently been presented to this court, and the general rules applicable to them are familiar and well settled, but from the nature of the subject each case must be decided upon its own facts.

The first inquiry which naturally suggests itself in this case is whether any "subject" is expressed in the title of this act; and if so, what it is. The title is, "An act to amend the several acts in relation to the city of Rochester."

The city of Rochester is a municipal corporation, created by law; and the use of that name in the title refers to such corporation. This is not only the strict legal construction of the title, but such is its popular signification. No one could suppose that it meant anything else than the organized political body known by that name. The name, therefore, "The city of Rochester," is as expressive as if the word corporation had been prefixed to it. The name signifies the corporation of the city; and, when used in connection with the announcement of a bill to amend the several acts relating to the city, it is impossible to give it any other construction. The learned counsel for the appellant refers us to the distinction between the charter, or act of incorporation, and the corporation itself; the former being the act creating, and the latter the thing created. In legal definition this distinction exists; but it has no practical importance in this case. A municipal corporation is a part of the governmental machinery of the State, organized not for the purpose of private gain, like private corporations, but for the purpose of exercising certain functions of government, within a specified locality; and it possesses such powers, and such only, as are conferred upon it by the legislature; and they are to be exercised in such form, mode and manner, and by such agencies as the legisla-

ture may from time to time prescribe, within the limits of the Constitution. The charter, as it is called, consists of the creative act and all laws in force relating to the corporation, whether in defining its powers or regulating their mode of exercise. Under the Constitution of 1821, it required a two-thirds vote to create or alter a corporation; and it was held that "Any act which affects the powers of a municipal corporation by enlarging or abridging them, or applying them to new subjects, or authorizing their exercise on new occasions, or in new modes and forms, *alters* a corporation." (23 Barb., 34.) There may be in some respects, not important to be noticed, a distinction in a municipal corporation in respect to its governmental, legislative, or public character, and its proprietary or private character. We have only to consider it in its public character; and over all its civil, political or governmental powers the legislature is, in the nature of things, supreme and without limitation, unless restrained by the Constitution. (Dill on Municipal Corporations, § 39.) Laws relating to any specified municipal corporation are those which create the body, or define and regulate its powers and prescribe the mode of their exercise, and, taken together, constitute in a practical sense its charter. An act, therefore, in relation to the city of Rochester, whether the word corporation is used or not, is an act which may affect any or all of the corporate powers of the city; and when a bill is advertised as an act to amend the several acts in relation to the city of Rochester, the subject of the corporate powers of the city and their regulation is still more distinctly expressed. Such a title expresses a subject comprehensive enough to embrace all the details of a city charter. The title of this act is in no legal sense different from that of the act passed in 1861, which, with the amendments since made, constitute the present charter (so called) of the city. That title was "An act to amend and consolidate the several acts in relation to the charter of the city of Rochester." The word "consolidate" has no relevancy to the point in controversy, and only signifies that all the acts are to be brought into and re-enacted

in one act. The word "charter" adds nothing to the title, in law or common understanding. At most, it could only be regarded as slightly more expressive of the subject than this; but substantially it is the same. If the invalidity of this act is to be maintained on the ground that no subject is expressed in its title, the city government has been administered since 1861 without any legal authority. The government of nearly every city and village in the State has been organized under acts with similar titles, and no one has been astute enough thus far to discover that they were for that reason invalid. The case of *The People* v. *Hills* (35 N. Y., 449) is entirely unlike this. There, the title was "An act to amend chapter 389 of the Laws of 1851." That act was properly held invalid because no subject was *expressed* in the title. The learned judge, who delivered the opinion in that case, intimated that if the particular section in the act proposed to be amended had been referred to in the title, it would have been good; but I doubt whether that would have cured the defect. The Constitution requires that the subject should be *expressed*. That title expressed no subject, but only contained a reference where the subject might be found. If the title of the act proposed to be amended had been inserted, it would have been free from the constitutional objection. It seems to me very clear that a subject is expressed in this title, which is the government or charter or corporation of the city of Rochester, and hence the bill may embrace all the details of the city government. It is unnecessary that a law, in order to operate as an amendment to a municipal corporation, should specify that it is an amendment to the charter or any existing act. It is sufficient if its provisions affect the corporation in its governmental capacity. The sections of this act, therefore, which are not specified as amendments in the act itself, are as valid and effectual as other parts of the act which are so specified.

The next question is whether any subject is contained in the act not embraced in the title. As we have seen, the subject expressed embraces the details of the city government,

and any provision which relates to that government may be inserted in such an act, and as a general rule the means necessary or proper to accomplish the general design indicated in the title of the bill may be adopted. (19 N. Y., 116; 8 N. Y., *supra*; *Matter of Mayer*, *ante*, p. 504.) A subject has a signification according to its application, and it is capable of almost infinite division, and many particular or subordinate subjects may be included in one general subject.

A city charter embraces many minor subjects, and yet they are all embraced in the general subject of the charter or corporation. In an act in relation to Lake avenue it would not be competent to insert provisions respecting Mount Hope avenue. As to such a bill, Lake avenue would be the subject. So in a bill in relation to education in the city, it would be improper to insert provisions in relation to streets or police, unless they were in some way legitimately connected with the subject of education. But where the subject is general, comprehending all the functions of the corporation, provisions in relation to any of them, or necessary, or pertinent to accomplish and carry out any of them, may be, so far as this constitutional clause is concerned, incorporated in the bill. No one can be misled by such a title, and legislators and people are alike notified of the purpose of the act.

It is insisted by the counsel for the appellants that there are several subjects in the act. It is only necessary to notice two of them. The 20th section confirms the proceedings of the common council as to certain improvements in Lake avenue, and authorizes the city railroad to lay its tracks on the sides instead of the center of the avenue under the direction of the common council. This provision is so intimately connected with the regulation of the street by the city authorities as to preclude the idea that it is an independent subject. The authority conferred upon the railroad company is a mere incident to the improvement of the street. The principal point relied upon is that the authority conferred upon the water commissioners by the 25th section of the act, to contract with the trustees of villages through which the water to the city may be

conducted, to supply such villages with water and authorizing the trustees to levy the annual expense with their annual tax, is one or both of them, an independent subject not embraced in the title. It is not denied that provisions for furnishing the city with a supply of water relate to the legitimate functions of a city government, and are properly included in such a bill as this. That object it seems was secured by an independent bill to which these provisions are amendments. The purpose of both is to furnish the city with water for extinguishing fires and other public uses, and also to furnish the inhabitants of the city with pure water for domestic purposes. The latter may be regarded as a means or instrumentality of accomplishing the former. To secure this object it is assumed to be necessary for the city authorities to go beyond the limits of the city to procure the requisite supply, and in doing so they must come in contact and deal with private and other interests in no way connected with the city. They must take private property, pass over and use public highways, streets, and perhaps railroads. The authority to secure these rights, although it may involve details in no other way connected with the city, and may affect other persons or corporations and their property, does not constitute it an independent subject. The power to supply villages with water by contract is incidental to the main purpose, and may serve as a means of attaining it. The authority conferred upon the trustees to levy the tax, was indispensable to render the contract effectual. The power to sell involves the power to buy and pay for, and taxation was the only mode which could be adopted for that purpose. The choice of means is with the legislature, and we cannot detach a mere instrumentality and declare it independent, unless it is entirely incongruous and foreign to the principal subject. An act entitled "An act for the relief of J. L," was held valid by this court, although it authorized the common council of a city to levy a tax and pay the claimant $600 beyond the contract price for building a sewer. (19 N. Y., 116.) The court said: "The different steps by which the relief is to be brought about are not distinct subjects, but

are minor parts of the same general subject. The degree of particularity with which an act is to express its subject is not defined in the Constitution, and rests in the discretion of the legislature." And in 8 N. Y. (*supra*) the court said: "Whether the description of the subject may not be more specific is a question for the legislature."

It seems to me that it would be going too far for the courts to declare a measure, adopted by the legislature to accomplish a given purpose, a subject independent of that purpose, where we can see that it would or might facilitate its accomplishment. Within this limitation the judgment of the legislature is conclusive. Under a similar provision in the Constitution of Kentucky, it was held that in an act entitled "An act to amend the charter of the Cincinnati and Covington Bridge Co.," a provision that the bridge company might sell and the city of Covington might subscribe for $100,000 of the stock, and sell the bonds to the city and levy a tax to pay them, was valid. The court said: "None of the provisions of a statute should be regarded as unconstitutional where they all relate directly or indirectly to the same subject, have a natural connection, and are not foreign to the subject expressed in the title. * * * The power to sell the stock to the city of Covington requires that a power should be conferred on the latter to subscribe and pay for it; for without such a power, the power to sell would be nugatory. The subject is the same." (2 Met., 219.)

In 27 Ill. R., 534, it was held that, in an act entitled "An act to incorporate the North-western University," a provision prohibiting the sale of spirituous liquors within four miles of the location of the college was valid under a similar constitutional provision, upon the ground that it was competent to embrace within the act everything designed to facilitate the object expressed. The court say: "Its purpose was to keep far away from the members of the institution the temptation to intemperance and its attendant vices," and that it was not objectionable because others might be affected by it. Under a similar pro-

vision in the Constitution of Pennsylvania, it was held that "An act to increase the boundaries of Forrest county," provisions for the location of the county site, and procuring donations for erecting county buildings, were connected with the subject expressed in the title and were valid. (53 Penn. R., 391.) Similar decisions have been made in other States where this constitutional clause is found, and in every case the courts concur that the means of accomplishing a general purpose, and all matters fairly and reasonably connected with it, are proper to be incorporated within the bill, and are germane to the title. The views of the appellants would require one act authorizing the water commissioners to conduct the water through villages, another authorizing them to contract with village trustees for a supply of water, and another authorizing the trustees to contract with them and levy a tax to pay the expense; thus requiring three independent acts to accomplish an incidental detail of a general subject. This constitutional clause does not, I am persuaded, involve any such circumlocution.

But there is another answer to this objection as affecting this case. If the village clause should be construed as another subject it would be invalid, but would not affect other parts of the law in no way connected with it, the subject of which is properly expressed in the title. These actions depend upon the validity of those provisions providing for the appointment of commissioners of public works, and defining and regulating their powers, and which constitute the principal part of the act. The village clause is contained in some amendments to another act in relation to supplying the city with water, and has no connection with and is in no way dependent upon those provisions relating to public works. The Constitution declares that every such bill shall contain but one subject, to be expressed in the title, but does not expressly or by fair intendment declare that provisions, the subject of which is expressed, shall be void. That the valid part should be upheld is not only in accordance with elementary principles, but is sustained by authority. It is a universal rule that

where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void, unless the provisions are so connected together in subject-matter, meaning or purpose, that it cannot be presumed the legislature would have passed the one without the other. (*Gordon* v. *Cornes*, 47 N. Y., 608.) And this rule applies as well where the forms observed are sufficient for some of the purposes of the act, and not for others; as where a part of the act is constitutionally invalid for any other reason. (Cooley's Con. L., 176.) In *Fishkill* v. *Plank-road Co.* (22 Barb., 642) this point was expressly decided in an opinion by EMMOTT, J. In *People* v. *O'Brien* (38 N. Y., 193) this court decided that the particular section only containing the obnoxious provision was void. In *Davis* v. *The State*, 7 Md., 151, the court said: "In such a case the irrelevant matter would be rejected, while the principal subject of the law would be supported if properly described in the title."

Judge Cooley, in his recent valuable work on Constitutional Limitations, in treating upon this subject, says: "But if the act is broader than the title, it may happen that one part of it can stand, because indicated by the title while as to the object not indicated by the title, it must fail. Some of the State Constitutions, it will be perceived, have declared that this shall be the rule; but the declaration was unnecessary, as the general rule, that so much of the act as is not in conflict with the Constitution must be sustained, would have required the same declaration by the courts. If by striking from the act all that relates to the object not indicated by the title, that which is left is complete in itself, sensible, capable of being executed, and wholly independent of that which is rejected, it must be sustained as constitutional. The principal questions in each case will therefore be, whether the act is in truth broader than the title, and if so, then whether the other objects in the act are so intimately connected with the one indicated by the title, that the portion of the act relating to them cannot be rejected and leave a complete and sensible enactment which shall be capable of being executed."

This clear and comprehensive rule was the result of a review of the several State Constitutions and judicial decisions on the subject, and its good sense commends itself to my judgment, and renders further argument unnecessary. I have been unable to find from examination of numerous authorities in this and other States a single decision, *dictum* or intimation to the contrary from any court or judge. It should be observed as confirmatory of the correctness of this construction, that it avoids the evils which the constitutional clause was designed to prevent as effectually as if the whole act should be declared void. No influence could be secured for the passage of an act, by the insertion of foreign matters, which could be of no practical importance, and there could be no inducement to insert such matters fraudulently, when they would be void and useless. On the other hand, great injury might be produced by a different construction. Important public and private rights, growing out of and dependent upon legitimate provisions of a local bill, fully described in its title, might be jeoparded or destroyed by the presence of a provision upon a matter not strictly relevant to the general subject. Whether such a provision should be inserted inadvertently or fraudulently, or from an erroneous construction of its nature, there would be neither reason nor justice in obliterating the whole act and destroying all rights and interests which had grown up or existed under it. Take for example an act to reorganize the government of the city of New York, which would involve all its varied governmental interests, executive, legislative and judicial, embracing extensive powers over life, liberty and property, as well as authorizing and regulating public obligations, duties, rights and responsibilities, the injury which might be inflicted upon the community and individuals by a judicial condemnation of the whole act because a single provision might be found in it possibly, after years of operation, not strictly germane to the general subject, cannot be calculated. If such a construction was demanded by the terms of the Constitution, it should be adopted by the courts, regardless of consequences, because

there are no evils equal in magnitude to those which may result from violations of the fundamental law. But the language of the constitutional clause does not require such a construction, and I think does not permit it, while the one here indicated will equally well prevent the evils at which the clause was aimed, and is far more promotive of public and private interests and more consonant with sound reason and all the analogies of the law. Whether the legislation embraced in this bill is conducive to the best interests of the people of the city is a question we have not considered and have no right to consider, but that it does not violate the Constitution so as to affect the title to office of the defendants we have no doubt. These views render it unnecessary to discuss the additional point involved in the second action.

The judgment in each action must be affirmed, with costs.

ALLEN and ANDREWS, JJ., concur. RAPALLO, J., concurs on last ground discussed in opinion. GROVER, PECKHAM and FOLGER, JJ., dissent.

Judgment affirmed.

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JOHN A. WEEKS, Respondent, *v.* THOMAS LOVE, Appellant.

The right of a creditor of a manufacturing corporation, organized under the act of 1848, authorizing the formation of corporations for manufacturing and other purposes (Laws of 1848, chap. 40), to maintain an action against one or more of the stockholders of such corporation to enforce the liability imposed upon them by said act (section 10), is a several and distinct right, and not a joint right in the creditors generally.

He can, therefore, sue alone to enforce this liability, although there may be other creditors similarly situated.

(Argued December 11, 1872; decided December 24, 1872.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of plaintiff entered upon a verdict rendered under the direction of the court.

Opinion of the Court, per ANDREWS, J.

The nature of the action and the facts pertinent to the question discussed, appear in the opinion.

William F. Shepard for the appellant. This action is not authorized; the right of action is given to all the creditors of the company similarly situated, jointly. (*Osgood* v. *Laytin*, 5 Abb. [N. S.], 1, 9, 10; 4 Eds. Stat. at Large, 202, 210, § 20; *Bank of Poughkeepsie* v. *Ibbotson*, 24 Wend., 472; *Garrison* v. *Howe*, 17 N. Y., 458; *Burr* v. *Wilcox*, 22 id., 551.)

Theodore F. Sanway for the respondent. The right to sue on a stockholder's liability is a several and distinct right, and not a joint right in the creditors generally. (*Corning* v. *McCollough*, 1 N. Y., 47; *Abbot* v. *Aspinwall*, 26 Barb., 202; *Bank of Poughkeepsie* v. *Ibbotson*, 24 Wend., 472; *Garrison* v. *Howe*, 17 N. Y. [3 Smith], 458, 462; *Burr* v. *Wilcox*, 22 id. [8 Smith], 551, 557.)

ANDREWS, J. This action was brought to recover of the defendant, as a stockholder in the Peekskill Enameled Iron Company, a manufacturing corporation, organized under the act of February 17, 1848, the amount of a debt owing by the company to the plaintiff, upon which judgment had been recovered against the company, and execution thereon returned unsatisfied before the commencement of the action.

By the tenth section of the act it is declared that all the stockholders of a company incorporated under it shall be severally individually liable "to the creditors of the company," to an amount equal to the stock held by them respectively, for the debts of the company until the whole capital stock shall have been paid in.

The twenty-fourth section declares that no stockholder shall be personally liable for the payment of any debt of the company which "is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of the debt shall be brought against the company within one year after the debt shall become due."

Opinion of the Court, per ANDREWS, J.

The liability of the defendant as a stockholder under this act is not contested; nor that the plaintiff is a creditor, for whose benefit this liability can be enforced.

It appears, however, that there are other creditors of the company similarly situated with the plaintiff; and the objection is taken, which raises the only question in the case, that the plaintiff cannot sue alone, and that his only remedy to enforce the liability of the defendant, under the statute, is by an action to which all the creditors, standing in a similar relation, shall be parties.

It has been settled by decisions in this State, in actions brought by a single creditor to enforce a stockholder's liability under this and other statutes containing similar provisions, that an action at law could be maintained against one of several stockholders to recover a debt owing by the corporation. (*Bank of Poughkeepsie* v. *Ibbotson*, 24 Wend., 472; *Garrison* v. *Howe*, 17 N. Y., 458.)

The point that the action could not be maintained by a single creditor, where there are others similarly situated, was not directly taken; but the liability of a single stockholder to be sued was contested on the ground, among others, that such a construction of the statute would subject a stockholder to suits by separate creditors, and to the costs of several actions; and the court, in the cases referred to, assumed that this result would follow, but held that this inconvenience was not a sufficient ground for exempting a stockholder from liability in an action at law.

These decisions recognize the rule that an action can be maintained by a single creditor; and although it does not distinctly appear in these cases that there were other creditors than the plaintiffs therein, it does appear that the corporations, in which the defendants were stockholders, were dissolved or had become insolvent, and, by clear implication, that there were corporate debts other than those upon which the actions were brought.

To hold that the plaintiff could not maintain this action because there were other creditors, would confine the appli-

cation of these decisions to the case of a suit against a stockholder by the sole creditor of the corporation.

The right of one of several creditors to maintain the action is also the reasonable construction of the statute.

Construing the tenth section in connection with the twenty-fourth section, it is apparent that the declaration in the tenth section, that the stockholders shall be liable to the "creditors" of the company, does not create a liability in favor of all the creditors.

This liability is, by the twenty-fourth section, limited to such creditors as have debts which were payable within a year from the time they were contracted, and upon which judgment had been obtained against the corporation upon suit brought within the same time after they became due.

The right to bring suit against the stockholder is a several and distinct right in the creditor, depending upon special circumstances, and not a joint right in the creditors generally.

The provision in the twenty-fourth section that no suit shall be brought against a stockholder who has ceased to be such for "any debt so contracted," unless brought within two years after he has ceased to be such, confirms this construction.

It assumes a liability to suit for a debt as a single, complete cause of action, and not merely a liability in equity to be enforced in an equitable action.

The personal liability of stockholders, under these acts, may be enforced in an equitable action against all the stockholders. The liability is created for the security of creditors; and, upon the dissolution or insolvency of the corporation, it may be treated as corporate property; and the court may, in a proper action, provide for taking an account and enforcing the liability of all the stockholders for the benefit of all the creditors entitled to share in the fund collected from the stockholders, in satisfaction of their liability. (*Briggs* v. *Penniman*, 8 Cow., 387; *Mann* v. *Pentz*, 3 Comstock, 415; *Osgood* v. *Laytin*, 5 Abb. [N. S.], 1.) And it was intimated in *Garrison* v. *Howe* that a stockholder who had been sued by a creditor, in case a recovery against him would sub-

ject him to a greater liability for the debts of the corporation than his share, as between himself and the other stockholders, might commence an equitable action against all the creditors and stockholders for an account and for contribution, with a view to distribute the burden of the debt among the stockholders according to the amount of stock held by them respectively.

But these questions do not arise in this case.

The sole ground urged by the appellant here is that an action at law, where there are several creditors, will not lie, in any case, in favor of one of them, against a stockholder in a corporation organized under the act of 1848.

This cannot be sustained upon the construction of the act, or upon the authorities.

The stockholder, when judgment has passed against him, and his personal liability is fixed for the debts of the corporation to an amount equal to the stock held by him, or when he has paid debts of the corporation to that amount, is relieved from further liability.

Until that time he may be charged in an action by a single stockholder.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

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JEREMIAH J. COLMAN et al., Respondents, *v.* ISAAC DIXON, Appellant.

A defendant has not an absolute legal right to have the facts upon which plaintiffs' claim for equitable relief depends, tried by a jury. The mode of trial, in such cases, is a matter of discretion with the court, and its decision, in respect thereto, is not reviewable in this court.

A defendant has no absolute right to a preliminary order settling issues in an action for equitable relief to be tried by a jury. A refusal to grant such an order does not necessarily deprive the defendant of his right to such trial. If he has that right and the cause is brought to trial before the court without a jury the defendant may then object, and it will be the duty of the court to order the cause to be tried by a jury. If

the court refuse so to do, defendant's remedy is by appeal from judgment.

An appeal to this court from an interlocutory order is premature and improper.

(Argued December 17, 1872; decided December 24, 1872.)

APPEAL from order of the Superior Court of the city of New York, affirming an order of Special Term denying defendant's motion for an order settling issues in the action to be tried by a jury.

The nature of the action and the facts sufficiently appear in the opinion.

William H. Arnoux for the appellant. Defendant's right to a trial by jury in this case is a constitutional right the court cannot deny. (Const. N. Y., art. 1, § 2; *Wynehamer* v. *People*, 13 N. Y., 426; *Greason* v. *Keteltas*, 17 id., 498; *Heywood* v. *City of Buffalo*, 14 id., 534; *Barlow* v. *Scott*, 24 id., 40; *Bradley* v. *Aldrich*, 40 id., 504; *Lattin* v. *McCarty*, 41 id., 110, 112, note; *Dain* v. *Delano*, 11 How., [U. S.], 29, 35; *McCoy* v. *U. S. Bank*, 5 How., 548; 1 Warren Law Studies, 631; *Sheppard* v. *Steele*, 43 N. Y., 52, 57; *Thompson* v. *Erie R. R.*, 45 id., 468, 473.) Under plaintiff's claim for damages defendant had a right to a trial by jury. (*Hudson* v. *Caryl*, 44 N. Y., 554; *Barlow* v. *Scott*, 24 id., 45; *Davis* v. *Morris*, 36 id., 569, 572; *Penn. Coal Co.* v. *Del. and Hud. Co.*, 1 Keyes, 72, 76; *Gilbert* v. *Birkenshaw*, Lofft., 771; *Whitney* v. *Emmett*, Bald., 323.)

RAPALLO, J. The complaint prays a perpetual injunction against the future use by the defendant of the plaintiffs' trade-mark, and also damages for the past use by the defendant of the same trade-mark. The defendant, before the cause came on for trial, moved at Special Term for an order settling issues in the action for trial by jury. The proposed issues accompanying the notice of motion relate solely to the right of the plaintiffs to the trade-mark, and to the question whether the defendant has violated that right. The motion was

denied at Special Term, and the order denying it was affirmed at General Term. From the order of affirmance the present appeal is taken.

To entitle the plaintiffs to maintain this appeal, it must appear that the order appealed from has deprived them of a substantial right. The right of trial by jury in a case which, under the provisions of the State Constitution, is triable in that form, is a substantial right, and if the defendant has, by the order in question, been deprived of that right, the case is appealable. Otherwise, it is not.

It is claimed on the part of the defendant that so much of the plaintiffs' cause of action as relates to his claim for damages is separable from the claim for a perpetual injunction and is triable by jury. Assuming, without at present deciding, that the defendant is correct in this position, yet we are of opinion that the refusal of a preliminary order settling issues in the case, does not necessarily deprive the defendant of his right of trial by jury. If he has that right in the present case and the cause is brought to trial before the court without a jury, the defendant may then object to the adjudication of the plaintiffs' claim for damages, and insist upon a jury trial. That objection may be met by a waiver of the claim for damages, and the cause can then properly proceed and the right to a perpetual injunction be passed upon. Should the plaintiffs insist upon their claim for damages, it would then be the duty of the court, if requested, to order that the cause be tried by a jury. (*Davis* v. *Morris*, 36 N. Y., 569; *Barlow* v. *Scott*, 24 id., 40; *Hudson* v. *Caryl*, 44 id., 553.) Should this request be refused, and should the court proceed to award damages, the defendant's remedy by appeal from the judgment would be perfect. But the defendant has no absolute right to an order at a preliminary stage of the case, for the framing of issues to be tried by a jury. The refusal of that order did not necessarily compel the defendant to submit to the trial by the court of the claim for damages.

The issues proposed by the defendant do not even refer to the question of damages or purport to submit that question

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to the jury, but they do cover the facts upon which the plaintiffs found their claim for equitable relief. And the defendant now insists that he had a legal right to have the facts upon which the claim to equitable relief depends tried by a jury, for the reason that courts of equity frequently require, as a condition of the granting of an injunction in such cases, that the plaintiffs' right be first established at law.

This position cannot be maintained. Although where the right is doubtful it is customary to refuse an injunction until after a trial at law, yet this is optional with the court. It has full power to determine for itself the questions of fact upon which the right to equitable relief demanded may depend, and the awarding of issues is discretionary.

The result of the trial may be that no question as to the power of the court to adjudicate upon the question of damages will arise or that no right of the defendant in that respect will be violated. Under such circumstances, an appeal to this court from an interlocutory order is premature and improper.

The appeal should therefore be dismissed, but as the respondents did not appear upon the argument of the appeal, the dismissal should be without costs.

All concur.

Appeal dismissed.

THE CONTINENTAL NATIONAL BANK, Appellant, *v.* THE NATIONAL BANK OF THE COMMONWEALTH, Respondent.

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Where a forged certification of a check is presented, at the bank upon which the check is drawn, to the teller whose certificate it purports to be, and he pronounces it genuine, he adopts the certification, and the bank is bound by it the same as if it was genuine.

It is not necessary to an equitable estoppel that the party should intend willfully to mislead; but whatever may be the intent, if he make such a representation as a sensible man would take to be true, and believe that it was meant that he should act upon it, and he does so act, the party making the representation is precluded from contesting its truth.

So also, it is not necessary that a party should act affirmatively upon a declaration to claim an estoppel. If he has acted not in reliance upon it, but

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has means in his power to retrieve his position, and relying upon the statement and in consequence of it, he refrains from using these means, his claim will be upheld.

The arrest and detention of a swindler are powerful means in coercing restoration of property he has unlawfully obtained, and the loss of these means in consequence of a reliance upon the declarations of another estops that other from denying the truth of the declarations (RAPALLO, J., dissenting).

C. & Co. delivered to R. certain gold checks and certificates, receiving therefor R.'s check upon plaintiff's bank, purporting to be certified by its teller. C. & Co. immediately sent a messenger with the check to plaintiff's bank, who handed it to the teller, asking if it was all right. The teller replied that it was. The messenger immediately returned and reported this to C. & Co. The certification was in fact forged. Relying upon the declaration of the teller, C. & Co. refrained from taking such measures as might and probably would have stopped the payment of the gold checks, or a portion of them. C. & Co. deposited the check with defendant. Plaintiff brought suit to recover back the money paid thereon. Upon the trial the judge, after charging, in substance, that if C. (one of the firm of C. & Co.) had done all that could be done on his part at the time of making the declaration, and had put himself in such a position that the declaration could not affect his action, then the principle of estoppel would not apply, charged as follows: "The delivery of these gold checks on the part of Mr. C., it is insisted upon, is in law a delivery of the gold. I think it was not."

Held, that although the charge, if construed as a statement of law applicable to all cases, might be technically inaccurate, yet, as used, it simply conveyed the idea that there was not such a delivery as prevented the interception of the checks and stoppage of payment, and so considered it did not mislead the jury, and was not error. Also *held*, that plaintiff was estopped by the declaration of its teller from questioning the genuineness of the certification.

(Argued December 4, 1872; decided December 17, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment in favor of plaintiff entered upon a verdict.

The action was brought to recover $63,062.50 paid by plaintiff upon a check dated May 1st, 1866, drawn upon plaintiff by one John Ross to the order of J. S. Cronise & Co. The check purported to be certified by the teller of plaintiff's bank and was received by Cronise & Co. from John Ross, the maker, as a certified check, and

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by Cronise & Co. deposited in defendant's bank. The certification was a forgery.

John Ross, who drew this check, was a dealer with the plaintiff and kept an account at its bank. On the 30th of April, 1866, Cronise & Co. sold $50,000 of gold, deliverable the next day, the 1st of May. This sale was made to brokers. These brokers "gave up," according to the phrase of the gold exchange, the name of John Ross as their principal, and that name was accepted by Cronise's clerks or partner in his absence. On the 1st of May, at about a quarter-past two o'clock, Ross presented himself at the office of Cronise & Co., never having been seen or known by any of the firm before. He presented the check in controversy in this case and asked for the gold coming to him, and stated he intended to make delivery of the gold to Albert Speyers.

Cronise handed the check to his clerk and told him "to go to the Continental Bank and see if that check was all right, and if not right to go to Speyers and stop the gold." The clerk went as directed, presented this certified check to the teller of the plaintiff's bank in the ordinary way, as the teller stood at his desk, and said to him, "Is that all right?" to which the teller replied, "yes." The messenger immediately returned and reported to Cronise this information. He had been absent not to exceed two minutes, but before he returned Ross had received gold checks and certificates to the amount of $50,000, to wit: Eight gold checks for $5,000 each on the Bank of New York, payable to his order, and two gold certificates for $5,000 each issued by the United States Treasury, payable to bearer, and had left the office. Cronise testified that he relied entirely upon the information obtained from plaintiff's bank, and in consequence took no steps to pursue Ross. Ross took the checks to the Bank of New York. Upon demanding the gold he was required by the teller of that bank to verify or identify himself before they would deliver the gold to him. This identification, which he accomplished by going to the Union Bank and bringing the authentication of its teller, occupied ten or

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fifteen minutes before he was able to get the gold which he demanded. That day or the next Ross left the country and has never been heard of since. Cronise & Co. indorsed the check given by Ross and deposited it in the defendant's bank at three o'clock on the afternoon of the 1st of May. The check was sent in through the clearing-house and charged to plaintiff in favor of defendant upon the morning of the 2d of May in the usual way. About twenty minutes past two o'clock on the following day, notice was given defendant that the certification was a forgery.

The court was requested to charge:

2d Request. That, to estop plaintiff, the check must *have been taken* for value *on the faith* of the acts or declarations of the plaintiff's teller.

3d Request. That it was not enough to show acts or declarations of plaintiff's teller inducing the belief that the certification was genuine, but it must be shown that the check was taken for value on the faith of such acts or declarations.

5th Request. That if the check was not shown to plaintiff's teller until after Cronise & Co. had actually delivered the gold checks and certificates to Ross, then the only question was the question of forgery.

6th Request. That if nothing further remained to be done by Cronise & Co. to complete their contract with Ross, then the delivery was not made on the faith of the statements of plaintiff's teller.

7th Request. That the jury could not speculate upon what *might* have been done or attempted by Cronise & Co., after the delivery by them of the gold certificates or checks to Ross, had they been apprised that the certification was a forgery after such delivery.

8th Request. That defendant's rights were not superior to those of Cronise & Co.

9th Request. That plaintiff was bound by the acts and declarations of its teller only so far as the same were within the scope of his authority; and that his verbal admission was

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not binding on plaintiff, unless authority to make such was proved or the statement ratified.

Each of which requests the judge refused to charge, except as he subsequently charged, and an exception was taken to each refusal.

The portion of the charge excepted to and other facts appear in the opinion. The jury found a verdict for the defendant, adding to their verdict the following words:

"We also find the certification of the check in question to be a forged certification."

Luther R. Marsh for the appellant. The statement of defendant's teller did not amount to an *estoppel in pais*, as it does not appear it was made to mislead. (*Pickard* v. *Sears*, 6 Ad. & Ell., 469; 33 E. C. L. R., 257; *Plumb* v. *Cattaraugus Co.*, 18 N. Y., 392, 394; *Finnegan* v. *Carraher*, 47 id., 493, 500; *Piper* v. *Gilmore* (Maine), 3 Am. Law Reg. [N. S.], 584; *Jewett* v. *Miller*, 10 N. Y., 402.) To claim an *estoppel in pais* it is necessary that the party urging it should have acted in the transaction and changed his position on the faith of it. (*Pickard* v. *Sears*, 6 Ad. & Ell., 469; *Welland Canal Co.* v. *Hathaway*, 8 Wend., 480; *Pres. Cong. of Salem* v. *Williams*, 9 id., 147; *Dezell* v. *Odell*, 3 Hill, 215; *Frost* v. *Sar. Mut. Ins. Co.*, 5 Denio, 154–158; *Pike* v. *Acker*, Hill & D. Supp., 90; *Truscott* v. *Davis*, 4 Barb., 495; *Power* v. *Pinkerton*, 1 E. D. Smith, 30; *Brookman* v. *Metcalf*, 4 Robt., 568; *Lawrence* v. *Brown*, 5 N. Y., 394–401; *Brown* v. *Rowen*, 30 id., 519–541; *St. John* v. *Roberts*, 31 id., 441; *Shapley* v. *Abbott*, 42 id., 443–448; *Dyer* v. *Cady*, 20 Conn., 563; *Rowe* v. *Jerome*, 18 id., 138; *Wilcox* v. *Howell*, 44 N. Y., 398; *Malony* v. *Horan*, 12 Abb., 289; *Eldred* v. *Hazlett*, 33 Penn. R., 307; Herman Estoppels, 445, § 449.) The question of estoppel, after the jury found that plaintiff's teller had recognized the certificate, was a question of law and not of fact. (*Martin* v. *Angell*, 7 Barb., 407, 409; *Lounsberry* v. *Depew*, 28 id., 44; *Dezell* v. *Odell*, 3 Hill, 215.) The teller had no authority to admit

that the forged certificate was genuine, and his statements in this respect did not bind the bank. (*Farmers and Mechanics' Bank of Kent Co.* v. *Butchers and Drovers' Bank*, 16 N. Y., 124; DENIO's opinion, 14 id., 623; Brown's opinion, 28 id., 425; in *Mead, Receiver*, v. *The Merchants' Bank of Albany*, 25 id., 143; *Irving Bank* v. *Wetherald*, 36 N. Y., 335.)

James Emott for the respondent. Defendant is entitled to the benefit of any estoppel of which Cronise could have availed himself. (*Farm. and Mech. Bank* v. *Butch. and Drov. Bank*, 14 N. Y., 623; *Griswold* v. *Haven*, 25 id., 595; *N. Y. and N. H. R. R.* v. *Schuyler*, 34 id., 30; *Ferguson* v. *Hamilton*, 35 Barb., 457; *Moss* v. *Averill*, 6 Seld., 450, 460; *Van Duzer* v. *Howe*, 21 N. Y., 538.) Plaintiff will not be permitted to retract its statement if Cronise was led by it to do or omit things he might have refused or have done, and which were prejudicial to his interests. (*Baker* v. *Union Mut. Life Ins. Co.*, 43 N. Y., 283, 289, and cases cited; *Plumb* v. *Cattaraugus Co.*, 18 id., 392, 394; *Pickard* v. *Sears*, 6 A. & E., 469, 475.) If plaintiff was bound by the statement of its officer, it was most clearly estopped. (*Irving Bank* v. *Wetherald*, 36 N. Y., 335.) The things done by Cronise and defendant on the faith of the statement of plaintiff's officer, are sufficient to estop plaintiff from denying its agent's statement. (*Kingsley* v. *Vernon*, 4 Sandf. [S. C.], 361; *Irving Bank* v. *Wetherald*, 36 N. Y., 335; 3 Comst., 151; 4 id., 236; 42 Barb., 18; *Delaware Bank* v. *Jarvis*, 29 N. Y., 226; *St. John* v. *Roberts*, 31 id., 442; *Brown* v. *Montgomery*, 20 id., 287.) Plaintiff's teller was authorized to make the statement made by him, and plaintiff is bound by it. (*Griswold* v. *Haven*, 25 N. Y., 595; *Irving Bank* v. *Wetherald*, 36 id., 335; *Merchants' Bank* v. *State Bank*, 10 Wallace, 604; *Van Duzer* v. *Howe*, 21 N. Y., 538.)

FOLGER, J. The jury have found to be a forgery the writing on the check, which purports to be a certification thereof

by the plaintiff's teller. They have also found that the teller, when resorted to, in effect pronounced it genuine.

That the plaintiff would be bound by the act of its teller, had he in fact certified the check, is settled. (*Far. & Mech. Bk.* v. *Butch. & Drov. Bk.*, 16 N. Y., 125; S. C., 14 N. Y., 623.) Nor do we doubt that an admission by him that it was genuine, made on the presentation to him of the counterfeited certification and inquiry put, also binds the plaintiff. We can see no difference in result, and effect upon others dealing with the check on the strength of that admission, between writing "Timpson, teller," signifying good, upon a worthless check, and declaring that the words "Timpson, teller," already there, were written there by him. In the one case they are his own, and signify good. In the other he adopts them as his own, and so makes them. his own, and they signify good. This was the effect of his admission. (And see 57 *Maine*, *infra*, *and Greenfield Bk.* v. *Crafts*, 4 Allen, 447.)

There seems to be no dispute but that the defendant takes the place of Cronise & Co., and may avail itself of any defence to the action of the plaintiff which that firm of brokers could have made.

The question then arises, is the plaintiff, by the other facts presented, estopped from maintaining that in truth the certification was a forgery, and the admission of its teller an innocent mistake?

There is no disagreement as to the general definition of an estoppel *in pais*. It is agreed that there must have been some act or declaration of the plaintiff or of its agent to the defendant's assignors, which so affected the conduct of the latter to their injury, as that it would be unjust now to permit the plaintiff to set up the truth of the case to the contrary of its mistaken act or declaration.

But the plaintiff insists that there are certain limitations to be put upon this generality.

1st. The plaintiff claims that it is necessary that its act or declaration must have been made to mislead.

To this proposition the plaintiff cites *Pickard* v. *Sears* (6

Ad. & Ell., 469; 33 Eng. Com. Law, 115), where the court say: "Where one by his words or conduct *willfully* causes another," etc. But this word "willfully," used in the decision in that case, has subsequently received judicial comment and limitation. Thus in *Freeman* v. *Cooke* (2 Exch., 654) the court say: "By the term 'willfully,' however, in that rule, we must understand, if, whatever a man's real intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and he did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon any person by usage of trade or otherwise to disclose the truth, may often have the same effect."

So in *Cornish* v. *Abington* (4 Hurl., & N., 549), POLLOCK, C. B., says: "The jury having found that the defendant, whether intentionally or not, led the plaintiff to form an opinion that he was dealing with the defendant and induced him to furnish goods to the defendant, the defendant must pay him for them." And referring to *Freeman* v. *Cooke*, and *Pickard* v. *Sears* (*supra*), the learned chief baron remarks to the effect that the word "willfully" means nothing more than "voluntarily," and he holds that if the representation was made voluntarily, though the effect upon the hearer was produced unintentionally, the same result would follow; and that if a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he cannot afterward say that he is not bound, if another so understanding it has acted upon it. Of course, this general language here extracted should be read in connection with the facts of that case to prevent carrying the force of these words too far. But it is shown that "willfully" and "voluntarily," as used in the definition of an estoppel, are convertible.

In *Man. & Trad. Bk.* v. *Hazard* (30 N. Y., 226) it is said that it is not necessary to an equitable estoppel that the party

should design to mislead. Be this *dictum* or rule, we do not find that it has been in this State disputed or questioned.

In *In re Bahia & S. P. Railway Co.* (Law R., 3 Q. B., 584) it is held that if a representation is made with the intention that it shall be acted upon by another, and he does so, there is an estoppel from denying the truth of what was represented to be the fact, and that the case is within the principle of *Pickard* v. *Sears*, as explained by *Freeman* v. *Cooke* (both *supra*).

The word "willful" does not mean *malo animo*, but so far willfully that the party, making the representation acted upon, means that it shall be acted upon in that way. (Per COMPTON, J., in *Howard* v. *Hudson*, 2 Ellis & Bl., 1.)

And we hold that there need not be, upon the part of the person making a declaration or doing an act, an intention to mislead the one who is induced to rely upon it. There are cases in which parties have been estopped where their acts or declarations have been done or made in ignorance of their own rights, not knowing that the law of the land gave them such rights. Here, certainly, there could be no purpose to mislead others, for there was not the knowledge to inform the purpose, and both parties were equally and innocently misled. (*Storrs* v. *Barker*, 6 J. C., 166.) Indeed, it would limit the rule much within the reason of it, if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who was estopped. And it has long been held, that where it is a breach of good faith to allow the truth to be shown, there an admission will estop. (*Gaylord* v. *Van Loan*, 15 Wend., 308.) There are decisions where the rule has been stated as the plaintiff claims it. We have looked at those cited by it. It was not necessary to the conclusions of the court in those, that such restriction should be put upon the rule, and we do not think that the language employed was used with the intention of making such a limitation, for the facts of the case did not require it.

2d. The plaintiff further claims that Cronise & Co. parted

with the gold and took the check before the declaration of the teller was made known to them, and that before an estoppel can be insisted upon it must appear that they acted in reliance thereupon, or altered their position in consequence thereof, or parted with some value on the faith therein.

The fair result of the testimony is, that Ross left the office of Cronise & Co. before the return of their messenger to it from the bank, and Cronise & Co. had then delivered the gold checks. They did no act, after his return, relying upon the declaration of the teller which the messenger brought to them.

Assuming, for the present, that they did in reliance upon that declaration refrain from action and left untaken any measures for the arrest of Ross or the stoppage of payment on the checks he had received; assuming that it is reasonably probable that, if they had been told by the plaintiff the reverse of what they were told, they would have acted and would have taken those measures; assuming that it is reasonably probable that action and such measures would have prevented the whole or some part of the damage which befell, can it be held that the conduct of Cronise & Co. was so affected to their injury by the declaration of the plaintiff as that the defendant may set up the declaration in estoppel of the plaintiff? The proposition contained in this query, we understand the plaintiff to resist. And this, because the act, the affirmative act, had been done which changed the position of Cronise & Co. toward Ross and the transaction before the declaration was made known to them, and had not been done in reliance upon it. And this is a denial, that after a declaration is made and is relied upon, an omission thereby induced to act and to take such measures as will arrest an impending evil, and an injury resulting from such omission, can be made available as an estoppel.

In *Howard* v. *Hudson* (*supra*), Lord CAMPBELL, C. J., recognizes the existence of the principle, that doing an act and omission to act are the same. (And see *Helme* v. *Phil. Life Ins. Co.*, 61 Penn. St., 107.) In *Knights*

v. *Wiffin* (Law R., 5 Q. B., 660) the person who relied upon the declaration had before it was made and not in reliance upon it, paid his money for property not delivered, but after it was made relying upon it, took no active course of conduct, remaining content and passive. Had the declaration been the reverse of what it was, which would then have been true, he might have taken active measures tending to retrieve his position. He rested satisfied in the belief, as a reasonable man, that the property had been passed to him as agreed. And he was damaged. The right of estoppel was there upheld, and it was maintained upon the ground of the plaintiff relying upon the statement and taking no steps further, and of his abstaining from active measures of recovery in consequence of the statement. It was there held, that acquiescent reliance upon the defendant's statement was an alteration of the plaintiff's position.

In *Casco Bank* v. *Keene* (53 Maine, 103) the question was presented. The plaintiff there held a note purporting to have been signed by the defendant. Hearing that the same was forged, the plaintiff asked the defendant, who, looking at the note, admitted the signature to be genuine. The plaintiff, in reliance on that admission, refrained from taking any proceedings against him who passed the note to it, so as to secure payment from him. The instructions to the jury were: That if the plaintiff, relying upon the defendant's admission, was induced to refrain from obtaining security by arrest of the one passing the note upon it or by attachment of his property, and thereby sustained an injury, the defendant would be estopped from denying his signature. This instruction was declared by the court on review to be in harmony with the principles applicable to estoppels *in pais*. (And see 15 Wend., *supra*, and *Brown* v. *Sprague*, 5 Denio, 545.)

These cases appear to us to lay down a sound rule. It must be that the conduct of men, which may be influenced by the declarations of those with whom they deal; is not confined to that which is shown by affirmative and positive acts following

upon and induced by those declarations. Conduct is not alone that which is active, positive and affirmative. Conduct, as limited to this inquiry, is the reserve of one's own powers of person and property, and of those means of help which can be summoned from friendly or accommodating sources and from the tribunals and officers of justice, and is as often forbearance of their use and quiescence and contentment with affairs as they are, as action designed to change affairs. And such quiescence and content, induced by false or erroneous statement, may be quite as damaging as any result from action. It is as bad to fail to recover property gone, when with the knowledge of an existing fact it might have been retrieved, as it is to lose it. And so it is as damaging to rely in quiet upon an untrue statement, to the neglect of using the means of recovery, as it is to rely upon an untrue statement, and by action thereon meet with loss irreparable. To hold otherwise, would be to assert that the law makes a difference between damage received by action and omission to act, in circumstances precisely similar, save in these elements. When an act produces conduct from which flows injury, it cannot matter whether that conduct be affirmative or negative, active or quiescent.

We assumed, for the purpose of the previous consideration of one branch of the subject, that Cronise & Co. did, in reliance upon the declaration of the plaintiff, refrain from action and leave untaken any measures. The jury have so found the fact, and the finding is sustained by the testimony. We also assumed that it was reasonably probable that if they had been told the truth by the plaintiff they would have acted, and have taken measures which would have prevented the whole or some of the injury which befell. The jury have found that this assumption is well founded.

Though, as is conceded herein, Ross left the office of the brokers before their messenger returned, he had left but a very short time; a time so short that, had the plaintiff declared the certification a forgery and the check worthless, there was ground for the jury to find that there was time for the broker's clerk, with his speed of foot, to have gone from

the bank of plaintiff to the office of Speyers, there have learned the falsity of Ross' assertion of a delivery of gold to Speyer, and thence to the office of Cronise & Co., and have delivered his message soon enough for measures to have been decided upon and taken for the stoppage of the payment of the checks at the Bank of New York. We leave out of view, for the present, the checks upon the subtreasury.

Nor was it a strained, unnatural nor unjustified inference for the jury to make, that the clerk would so have done, and that Cronise & Co. would have taken such measures and made stoppage of payment. It was but applying to the facts of the case, and to the position of the parties in this transaction, the common knowledge of human nature and its workings under powerful incentives, and at a particular spot in the State and a particular hour of the day when those incentives are pressed in their greatest strength.

And from these findings, thus authorized, it was a legitimate conclusion that Cronise & Co. suffered injury by the declaration to them of the plaintiff.

And if there is nothing else in the case, the verdict and judgment are to be sustained.

The plaintiff insists, however, that the learned judge at circuit made several errors in his refusals to charge as requested, and in the charge which he delivered to the jury.

We will notice all of these instances which are indicated upon the points handed up, alluding to the requests by the numbers given to them in the points.

The second, third and fifth requests are already covered by what we have said.

The seventh request is: "That the jury cannot speculate upon what might have been done or attempted by Cronise & Co. after the delivery by them of the gold certificates or gold checks to the person calling himself John Ross had they been apprised that the certificate was a forgery after such delivery."

If, by the word "speculate," which is the word of controlling meaning in the request, was meant to guess, or to reason to practical results from unproven premises, doubtless the

jury had no right so to do. And there would have been no error in the learned judge if he had so told the jury. But it would have been in the nature of an abstract proposition, not necessarily involved in nor growing out of the particular case. Hence it was not error for him to decline to charge, except as he did thereafter charge. He did charge them that Cronise & Co., to set up an estoppel, must have had time to stop payment of the gold; that the circumstances must have been such as that they could have done it; that they must have occupied such a relation to the transaction as that they could, with reasonable diligence, have arrested the crime in its consummation and have secured the gold; that they must have still stood in a position where they could have corrected any act and could have saved the gold. This put the jury upon the proper inquiry. Nor can we concede that, at the close of the trial, the question of estoppel had become one of law only and for the court, as is claimed by the learned counsel for the plaintiff. He admits that there were two questions yet for the jury; whether the certification was forged or not, and whether its genuineness was admitted. And, surely, it was still a question of fact how much relative time had been spent by the respective actors from the moment Ross left the office of Cronise & Co. until the payment of the checks at the Bank of New York; and, considering the relative positions of the different business places, whether, in that lapse of time, Cronise & Co., under all the circumstances, could have made effectual interposition to stop payment of the checks delivered to him, or have made any successful effort at recaption of the gold if he had received it.

It is claimed that the learned judge erred in charging the jury that the delivery of the gold checks was not, in law, a delivery of the gold.

The points call our attention to that part of the charge in which the language of the judge is: "The delivery of these gold checks on the part of Mr. Cronise, it is insisted upon, is, in law, a delivery of the gold. I think that it was not."

It is proper to see in what connection this was said. For,

standing alone or applied to any and every case of a delivery of checks, it might be in some of them erroneous. What was the practical application of it for the minds of the jury? The topic then under the learned judge's and the jury's attention was whether Cronise & Co. could, under the facts of the case, in any proper view of them, be considered as injured by the plaintiff's declaration; and the judge precedes the remark excepted to by saying: "If Cronise, in point of fact, had done all that could be done on his part at that time, and had put himself in such a position that this admission could not affect his action to his prejudice, then the principle of estoppel would have no application to the case so far as he is concerned." Then he tells them, in the remark excepted to, in effect: It is insisted that the delivery of these checks was a delivery of the gold, in law, so that he could not reclaim it; and if he could not reclaim it, then he was not injured by the declaration, for there was nothing he could do after such delivery. We may infer, properly, from the words "it is insisted," that all this had passed before the jury in the argument of counsel, either to the jury or to the court, and was a reference thereto. If it should be admitted to be technically inaccurate as a statement of law, applicable to all cases, it did not tend to mislead on this occasion; and, for the purpose for which it was uttered, it was correct. Doubtless the handing over of the checks was a delivery of the gold to fulfill the contract for the sale of it, in accordance with the rules of the brokers' board under which the original parties to the transaction acted. But it was not such a delivery as prevented Cronise & Co. from intercepting the checks at the counter of the Bank of New York, and there forbidding and stopping payment of them. And this is true, whether the gold be dollars, in which to make payment of a debt payable, or a commodity to be transferred in satisfaction of a contract for the sale and delivery of a chattel. The scope of the remarks of the court to the jury was that, notwithstanding Cronise & Co. had put these checks into the hands of Ross, still they could stop payment of them at the place of pay-

ment. And, so considered, it did not mislead the jury from the question at issue, or give them an erroneous rule of law by which to dispose of it.

The plaintiff claims that even if it should be held that it is estopped to show the truth, as to so much of the gold as was paid to Ross over the counter of the Bank of New York, it should not be as to so much of it as was represented by the checks on the subtreasury. And if these checks were alone concerned in the transaction, it might be said with force that Ross could have as soon got payment on them and clear escaped, as Harmon, the clerk, could have made his errand and returned. But these checks are connected with those on the Bank of New York; and Ross did not depart with the avails of the one until he had got the avails of the other. If Ross first went to the subtreasury and obtained payment, then he afterward went to the Bank of New York; and he was there, or to and from there, from ten to fifteen minutes; and this opportunity for stopping payment of the checks at the Bank of New York was also opportunity for arrest of his person, and obtaining from him the gold got at the subtreasury. And if it be said that he may have passed away the checks on the subtreasury in the street to a confederate, still he was at the Bank of New York to be seized, and the coercion of arrest to be used upon him. In the 53d Maine (*supra*) arrest is named as one of the means of obtaining security which the plaintiff had let slip; and in 5 Law Rep., Q. B. (*supra*), BLACKBURN, J., goes so far as to say that it needs not that it should appear that any benefit would result from the attempt to secure payment, but that the injured party had the right to make that attempt; and losing the exercise of the right by his reliance on the declaration, the declarant was estopped. We need not go so far here. Arrest and detention of the swindler is a powerful means in coercing restoration; and arrest and detention were as probably in the power of Cronise & Co. as the stoppage of the payment of the checks at the Bank of New York.

Statement of case.

The judgment appealed from should be affirmed, with costs to the respondent.

All concur, except RAPALLO, J., who concurs as to all but the subtreasury gold.

Judgment affirmed.

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JOHN PATTEN, Respondent, *v.* WILLIAM J. STITT, Appellant.

SAME, Respondent, *v.* SAME, Appellant.

Where, upon appeal to this court from an order granting a new trial in an equity case, the order is affirmed and judgment absolute ordered against appellant "without costs to either party," this disposes of all the costs in the action, and an insertion by respondent of costs in the judgment entered upon the remittitur is irregular.

A motion to correct the judgment is the proper remedy.

Whether an appeal from the judgment is proper in such case, *quere*.

(Argued December 17, 1872; decided December 24, 1872.)

THESE were motions to dismiss appeals. The first appeal was from an order of General Term, affirming order of Special Term, denying defendant's motion to correct judgment by striking out costs. The second appeal was from judgment of General Term, affirming judgment in favor of plaintiff, entered upon a remittitur from this court.

The action was an equitable one to obtain an injunction. It was decided below in favor of defendant. Upon appeal the General Term reversed the judgment and granted a new trial.

Upon appeal to this court the order was affirmed and judgment absolute ordered against defendant, that they be perpetually enjoined, etc., "without costs to either party." Plaintiff taxed his costs below in the action, and the amount was inserted in the judgment entered upon the remittitur. Whereupon defendant moved to correct the judgment by striking out the costs, and also appealed therefrom.

Opinion of the Court, per RAPALLO, J.

C. E. Lyon for the appellant.

Charles Jones for the respondent.

RAPALLO, J. The decision of the court was very plain that the absolute and final judgment, ordered in pursuance of the stipulation on the appeal, should be without costs. The remittitur conformed to the decision in that respect. All costs which previously were dependent upon the event of the action were disposed of by this final result. The plaintiff was irregular, therefore, in inserting costs of the action in the judgment entered upon the remittitur, and the motion to correct the judgment should have been granted. The motion to dismiss the appeal from the order is therefore denied, with ten dollars costs of opposing the motion.

Whether an appeal from the judgment is a proper remedy in such a case it is not necessary now to decide. We have held that no appeal will lie from a judgment which conforms to the remittitur. When the judgment varies from the remittitur, a different question may be presented; but as the defendant can obtain all the relief to which he is entitled under the appeal from the order, we have concluded to dismiss the appeal from the judgment. As the question is novel and the proceedings were occasioned by the irregularity on the part of the plaintiff, the dismissal is without costs to either party, either of the appeal or of the motion.

All concur.

Motion to dismiss appeal from order denied.
Appeal from judgment dismissed.

Statement of case.

MORTIMER J. MONROE, Appellant, v. WILLARD UPTON et al., Respondents.

Plaintiff brought suit to recover damages for the breach of a contract between the parties for the sale and delivery of a quantity of whisky. After trial was had, decision rendered against defendants, and costs adjusted, defendant U. filed his petition in bankruptcy. After this, and on the 26th January, 1868, plaintiff perfected and docketed his judgment. On the 10th July, 1868, U. obtained his discharge as a bankrupt. On the 1st July, 1871, plaintiff issued execution, and U. moved for a perpetual stay as to him, which was granted. *Held*, 1st. That the motion and order were in accordance with the practice, and defendant had lost no opportunity of pleading his discharge so as to forfeit the favor of the court; that a stay of proceedings under the twenty-first section of the bankrupt act would not have availed him in setting up his discharge, as it could only have intervened after trial, and he still would have been helpless without an order of the Supreme Court to open the case or let him in to plead *puis darrein*, and that the motion after the discharge was obtained was just as proper. 2d. That defendant had not been guilty of such "gross laches" in making the motion as to deprive him of the right to the relief sought. 3d. That plaintiff's claim was not merged in the judgment so completely to extinguish it and prevent the operation of the discharge. 4th. That as at the time defendant filed his petition the whole amount of plaintiff's claim was ascertained, it was a debt provable under the bankrupt act against the bankrupts' estate; and that, therefore, the stay was properly granted.

(Argued December 9, 1872; decided December 17, 1872.)

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, affirming order of Special Term, granting a perpetual stay of proceedings upon a judgment and execution, docketed herein, in favor of the plaintiff against the defendants, for $1,157.56 damages and $276 costs.

The action was brought on a contract for the sale and delivery of whisky, and tried by the court and decided on the 7th day of October, 1867.

On the 26th day of November, 1867, about one month after the decision and taxation of costs, the defendant Upton filed his petition in bankruptcy in the District Court of the

Statement of case.

United States. On the 20th January, 1868, the plaintiff entered judgment, and on the 10th day of July, 1868, the defendant was duly discharged as a bankrupt. On the 1st day of June, 1871, the plaintiff issued execution and the bankrupt procured the stay. The bankrupt proceedings were not questioned.

W. C. Rowley for the appellant. Defendant has had his day in court, and cannot plead his discharge. (Bankruptcy act of 1867, § 21, and cases cited; Bump's L. and Pr. in Bank., 166; 5 Geo. II., § 52, 7–13; § 126 of new act; Cook's Bank. L. and Pr., 88; Eden's Bank. Laws, 427; 1 Chitty's Stat., 342, 368, §§ 200, 162, 163; *Faxon* v. *Baxter*, 11 Cush., 35–37; *Cross* v. *Hobson*, 2 Caines, 102; *Van Valkenburgh* v. *Dedrick*, 1 John. Cas., 133; *Palmer* v. *Hotchkiss*, 1 Cow., 43; and *Mabbott* v. *Van Buren*, added in a note to this case; *Barker* v. *Judges, etc.*, 4 John., 191; *Morgan* v. *Smith et al.*, 9 J. R., 255; *Baker* v. *Taylor*, 1 Cow., 165; *Mechanics' Bk.* v. *Hazard*, 9 John., 393; *Stewart* v. *Green*, 11 Paige, 537; *Alcott* v. *Avery*, 1 Barb. Ch., 349; *Clark* v. *Rowling*, 3 Comst., 216; *Medbury* v. *Swan*, 46 N. Y., 200; 3 Den., 269; 18 J. R., 54, 336; 9 id., 392; 4 id., 407; 2 Caines, 102.) A judgment entered like the one in the present case is not included in the debts discharged. (Bank. act 1867, §§ 19, 32, 34; *Ex parte Charles*, 16 Ves., 256; S. C., 14 East, 197; *Russ* v. *Gridley*, 6 Hill, 250; *Kellogg* v. *Schuyler*, 2 Denio, 73; *Graham* v. *Parsons*, 6 Hill, 247; *Ex parte Thayer*, 4 Cow., 66; *Luther* v. *Deyo*, 19 Wend., 629.) The judgment is a new debt and plaintiff's original claim is completely merged in it. (*In re Montgomery*, 3 Bank. Reg., 108; *In re Williams*, 2 id., 79; *In re Brown*, 3 id., 171; *In re Crawford*, id., 171, 173; *In re Gallison*, 5 id., 353; *Mansfield's Case*, 6 N. B. R., 388, 393–395; *Dresser* v. *Brook*, 3 Barb., 429; *Betts* v. *Bagley*, 12 Pick., 572; *Haggarty* v. *Amory*, 7 Allen, 458; *Bradford* v. *Rice*, 102 Mass., 472; *Wyman* v. *Mitchell*, 1 Cow., 316; *Raymond* v. *Merchant*, 3 Cow., 147; 5 Geo. II., ch. 30, § 13; Eden's Bank. Laws, 427; *Thompson*

v. *Hewitt*, 6 Hill, 254; 1 Chit. Pl., 103, 478; *Miller* v. *Watson*, 5 Cow., 95; *Outram* v. *Moorewood*, 3 East, 346; *Fox* v. *Woodruff*, 9 Barb., 498; *Clark* v. *Rowling*, 3 Comst., 216.)

D. C. Hyde for the respondents. The perpetual stay was properly granted, as the discharge was granted after judgment. (1 Cow., 42, 165; 3 Comst., 216; 38 N. Y., 253.) Defendant has not had his day in court. (*Palmer* v. *Hutchins*, 1 Cow., 42.) Defendant was not guilty of laches. (*Dresser* v. *Brook*, 3 Barb., 440.)

FOLGER, J. The practice of the Supreme Court has been, to permit one cast in judgment, to avail himself of a bankrupt or insolvent discharge by motion and order for a perpetual stay of execution thereon. This was done in cases in which he had no opportunity to plead his discharge in the action. And if fraud or other ground impeaching its validity was alleged, the court would open the cause so that that question could be tried. (*Baker* v. *Taylor*, 1 Cow., 165.) But where he might have availed himself of it as a defence to the action, or had been guilty of gross laches in making the motion, relief would be denied to him. (*Valkenburgh* v. *Dederick*, 1 Johns. Cas., 133; *Cross* v. *Hobson*, 2 Caines Cas., 102.)

The defendant could not have pleaded his discharge in this action, for the trial was had, the report of the amount found due made, and costs adjusted before he had commenced his proceedings in the bankruptcy court; and judgment was docketed against him in the action before his discharge was granted.

It is claimed, however, that the bankruptcy court could have stayed the plaintiff's proceedings in this action on the motion of the defendant in that court.

The twenty-first section of the bankrupt act of March 2, 1867, provides that no creditor, whose debt is provable thereunder, shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until

the question of the bankrupt's discharge shall have been determined. And any such suit shall, upon his application, be stayed to await the determination on that question.

But it is apparent that a stay of proceedings, after the commencement of the defendant's proceedings in bankruptcy, would have been of no avail to him toward setting up his discharge against the claim sued upon in this action. The bankrupt court had power to stay the proceedings; but a stay would have intervened only after the trial. That court had not power to open the case in the Supreme Court, and to let the defendant in to plead his discharge. Had a stay been obtained, still the defendant was helpless to set up his discharge against the plaintiff's claim, without coming to the Supreme Court to open the case and let him in to plead *puis darrein*. And it was just as well to proceed and obtain his discharge, and then to move that court for a perpetual stay of execution. For if the defendant desired to allege fraud in the discharge, or in any way to test its validity, the court would, as we have seen, fit its order to that state of things.

The defendant did not, then, so neglect any opportunity of pleading his discharge as to forfeit the favor of the court. Nor can it be said that the defendant has been dilatory in making his motion for a stay of execution. The judgment was docketed on the 20th of January, 1868. The discharge in bankruptcy was granted on the 10th of July of that year. The plaintiff took no measures to enforce his judgment until June, 1871, when he issued this execution. The affidavits on which the defendant moved were sworn to in August of that year, and the motion was made in November. And it appears that some if not all of the lapse of time was suffered by the oral stipulation of the attorneys.

2d. But it is claimed that the discharge in bankruptcy is not operative against the judgment of the plaintiff.

The discharge which is granted is not against any debts but such as are by the act made provable against the estate of the bankrupt, and which existed on the day on which the petition was filed. (§ 19.)

The judgment did not exist on the day on which the petition was filed. It is not discharged if it is a new debt. The plaintiff claims that it is; and that his original claim is completely merged in it. But the authority in this State is against him; *Clark* v. *Rowling*, 3 N. Y., 216, and cases there cited, where it is held that, for such a purpose as this, it is not merged so as to be extinguished; and see *Dresser* v. *Brooks*, 3 Barb., 429. And we feel bound to follow the authority in this court, unless it is plainly shown by subsequent adjudications to be erroneous. So far from this being done, the cases cited by the plaintiff are divided upon the point involved. It is held that the debt is merged in the judgment in *Williams in re* (3 Bank Reg., 74), in *Gallison in re* (N. Bank Reg., 353), in *Mansfield's Case* (6 id., 388); and it is held that it is not in *Stevens in re* (4 Bank Reg., 122), in *Brown in re* (3 id., 145), in *Vickery in re* (id., 171). In *Crawford in re* (id., 171), it was held that the debt was merged in the judgment, but that the judgment, though not existing at the date of adjudication in bankruptcy, could be proved. In *Montgomery in re* (id., 108) it is held that a note existing at the date of the adjudication could not be proved because it had been renewed after that date; and that the renewal note could not be proved because it did not exist until after that date.

It is urged, also, that the claim of the plaintiff, on which he recovered his judgment, was not a debt which, by the terms of the bankrupt act, was provable against the bankrupt's estate.

The claim is stated in the affidavits to be for damages arising from a breach of contract between the parties for the sale and delivery of whisky. At the time of the filing of the petition, the action had been tried, and there had been a report of the judge fixing the amount of the plaintiff's damages, and his costs had been taxed; so that the whole amount due and payable to him had been ascertained. Certainly, the claim arising upon contract was provable. But the plaintiff says that he had only a finding in his favor in an action to recover unliquidated damages. But this finding ascertained the exact

Statement of case.

amount, and did just what the bankrupt court would have ordered done. (§ 19; *In re Clough*, 2 Bank Reg., 59.)

The order appealed from must be affirmed, with costs to the respondents.

All concur.

Order affirmed.

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WILLIAM FOSTER, Plaintiff in Error, *v.* THE PEOPLE OF THE STATE OF NEW YORK, Defendants in Error.

If the facts proved upon a criminal trial are capable of two constructions, or if, in one view of the evidence, a particular intent may be found, and yet the facts may justify the finding of an intent involving another degree of guilt, the court is bound, upon the request of the prisoner, to declare the rule of law applicable to the case in either aspect.

To constitute murder in the second degree, under the act of 1862 (chap. 197, Laws of 1862), the killing must be by a person engaged at the time in the commission of a felony, other than arson in the first degree.

Section 36 of the article of the Revised Statutes entitled "Of rape, maiming," etc. (2 R. S., 665, § 34), was intended as a statute definition of the crime of mayhem, and the term now includes only those injuries therein enumerated. A blow, aimed at and delivered upon the head, cannot constitute the crime of assault and battery, with intent to maim.

The prisoner intentionally aimed a blow, with an iron rod, at the head of the deceased, with a force likely to fracture the skull, and which did in fact crush it. The prisoner's counsel, upon the trial, requested the court to charge that, upon the indictment and evidence, the jury could convict the prisoner of murder in the second degree, and that if the prisoner killed the deceased by an assault upon him with a dangerous weapon, with intent to maim but without any intent to effect death, such killing was murder in the second degree. The court refused so to charge. *Held*, no error; that there was no evidence in the case which would justify the finding that the prisoner, when he inflicted the blow, intended to maim, or was engaged in the commission of, or intended to commit any felony other than the homicide with which he was charged; that fracturing the skull was not maiming, and even if it should be so assumed, as death was likely to result therefrom, an intent to fracture the skull, without killing, could not be predicated of the act; that the requests to charge were therefore irrelevant and inapplicable to the facts, and the court was justified in refusing.

The statutes and authorities defining the crime of *mayhem*, collated and discussed.

(Argued December 16, 1872; decided December 24, 1872.)

Statement of case.

ERROR to the General Term of the Supreme Court in the first judicial department, to review judgment of that court affirming judgment of the Court of Oyer and Terminer in and for the county of New York, entered upon a conviction of the plaintiff in error of the crime of murder in the first degree.

The prisoner was indicted for the murder of Avery D. Putnam, in the city of New York. Putnam took the Broadway horse cars on the evening of April 26th, 1871, with a lady and child. At Twenty-ninth street the child looked through the window in front door to see the clock upon the Gilsey House. The prisoner, who stood upon the front platform, opened the door. It was shut. Prisoner opened it a second and third time, and it was as often shut. Finally he came into the car and undertook to sit down by the child, which was prevented. He then began to jeer at Putnam, who took no notice of him. He then asked Putnam how far he was going up, to which he made no reply. Prisoner got up, shut his hand hard down beside him, and said: "Well, I am going as far as you go, and before you leave this car I'll give you hell." After the prisoner got out upon the platform he inquired of the driver if he had a car-hook, who told him he had, and pointed out to him where it hung. Prisoner then said he would learn him his business—when he got off the car he would learn him to keep his place. Putnam and his party got out at Forty-sixth street. As he was helping the lady off, the prisoner, who had seized the car-hook, ran around the car as it stopped, and struck him upon the head with the hook, crushing in his skull, of which wound he died three days thereafter. Prisoner's counsel requested the court to charge several propositions which are set forth in the opinion.

John K. Porter for the plaintiff in error. The refusal of the court to charge as requested was error. (*Fitzgerald* v. *The People*, 37 N. Y., 416; *People* v. *Enoch*, 13 Wend., 164; 2 R. S., 665, §§ 36, 39; p. 698, § 3, sub. 2; 2 Whar. Am. Crim. Law, §§ 11, 71; 23 Coke, 62, 118; 1 East Pleas of

Crown, 393; Const. of N. Y., art. 1, § 17; 2 Reeves' His. of England, 34, 35; Bracton De Corvill, fols. 144, 145; Glanville, Blain's translation, 350; Bk. 14, ch. 1, Britton Nichol's translation, 123; *Shorter* v. *People*, 2 Com., 203; Laws of 1862, chap. 197; *Davey* v. *People*, 10 N. Y., 154; 2 Park. Crim. R., 627; *Kelly* v. *Commonwealth*, 1 Grant, 493; *Ex parte Chauncey*, 2 Ash., 217; Wharton on Homicide, 41 [ed. of 1858]; *Keefe* v. *People*, 40 N. Y., 348; 19 Wend., 591–595; *People* v. *Eastwood*, 14 N. Y., 564.)

S. B. Garvin for the defendants in error. There was no evidence to support the requests to charge; the refusal was not, therefore, error. (12 Wend., 432; 31 N. Y., 338; Laws of 1862, chap. 197; *Fitzgerald's Case*, 37 N. Y., 427; 19 Wend., 605; 3 Park. Crim. R., 384; 2 Hand., 4.) The alleged error could not have affected the result, and a new trial should not therefore be granted. (*Gonzales' Case*, 35 N. Y., 60.)

ANDREWS, J. Upon the conclusion of the testimony, the prisoner's counsel requested the court to charge the jury that upon the indictment and evidence the jury could convict the prisoner of murder in the second degree, and further, that if the prisoner killed the deceased by an assault upon him with a dangerous weapon with intent to maim him, but without any intent to effect death, such killing was murder in the second degree.

The court refused to charge either of these propositions, and to this refusal the prisoner's counsel excepted.

This exception presents the only question argued by the learned counsel for the prisoner, and no ground is suggested for the reversal of the conviction and judgment except that the court erred in refusing to charge these propositions.

The court charged the jury that the defendant could not be convicted of murder in the first degree, unless he acted from a premeditated design to effect the death of the deceased, and that in the absence of such an intent, his offence was reduced to manslaughter.

Opinion of the Court, per ANDREWS, J.

The court, by the ruling upon the propositions of the prisoner's counsel and by the charge, excluded from the consideration of the jury the question whether the prisoner could upon the evidence be convicted of murder in the second degree, and decided, as matter of law, that such a conviction was not warranted by the evidence.

It was the duty of the court to instruct the jury as to the legal effect of conclusions of fact which they were at liberty to deduce from the evidence.

It is the province of the jury to determine questions of fact arising upon the evidence and the intent of the prisoner, but if the facts proved are capable of two constructions, or if in one view of the evidence a particular intent might be found, and yet the facts might justify the finding of an intent involving another degree of guilt, the court was bound, upon the request of the prisoner, to declare the rule of law applicable to the case in either aspect, as the jury might determine the facts.

This rule is fundamental, and is essential to the due administration of the law and to the protection of the accused. It was declared by Judge NELSON, in the case of *The People* v. *Enoch* (13 Wend., 164), as follows:

"It is the business of the court to see that a proper direction be given to the jury, in point of law, upon the evidence."

If there was in this case any evidence tending to prove that the prisoner was guilty of murder in the second degree, the court erred in refusing to give the instruction asked. It becomes necessary, therefore, to consider whether there was such evidence in the case, and, to determine it, we must ascertain what constitutes murder in the second degree.

The division of the crime of murder into two degrees was made by the statute of 1862. (Laws of 1862, chap. 197.) The killing of a human being without authority of law, "when perpetrated without any design to effect death by a person engaged in the commission of any felony," was murder by one of the definitions of that crime, contained in the Revised Statutes. (2 Rev. Stat., 657, § 5, sub. 3.)

By the amendment of 1862, the killing of another by a person engaged in the commission of a felony was made murder in the first degree only when perpetrated in committing the crime of arson in the first degree.

The other cases embraced in the definition of the Revised Statutes, above cited, were made murder in the second degree. The law of 1862 declares "that such killing, unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide, * * * or when perpetrated without any design to effect death by a person engaged in the commission of any felony, shall be murder in the second degree."

It was decided in *Fitzgerrold's Case* (37 N. Y., 413) that, under this statute, those cases only were murder in the second degree in which the killing was by a person engaged at the time in the commission of a felony other than arson in the first degree.

The question we are now considering depends, therefore, upon the fact whether the evidence discloses or tends to establish that the prisoner, when he inflicted upon Putnam the blow which resulted in his death, was engaged in the commission of a felony, within the purview of this statute. The prisoner when he struck the deceased intended to inflict a personal injury.

If any felony, therefore, was intended by the prisoner, other than the killing of the deceased, it was a felonious assault upon him.

It is claimed on the part of the people that the words "engaged in the commission of any felony," in the statute, do not include cases in which the killing resulted from intentional violence to the person killed, and where, although the intent was to commit a felonious assault, there was no intention to kill; or, in other words, where the felony intended, although not the felony of homicide, was the very act of personal violence which caused the death, that this is not a felony within the meaning of the statute.

A question of the same character has arisen upon the construction of the provision of the statute declaring that the

killing of a human being, without a design to effect death by the act, etc., of another, while such other is engaged "in the perpetration of any crime or misdemeanor not amounting to felony," shall be manslaughter in the first degree. (2 R. S., 661, § 6.) It has given rise to much discussion, and different views have been expressed upon it by judges, but it has never been determined by the court of last resort. (*People* v. *Rector*, 19 Wend., 608; *Darry* v. *People*, 10 N. Y., 120; *People* v. *Butler*, 3 Park. Crim. R., 377.)

What the true construction of the statute is, is immaterial in this case, unless the evidence warranted the inference, or unless the jury might have found from the evidence, that the prisoner when he struck the deceased intended to commit some felony other than the homicide with which he was charged.

We think that there is no evidence that the prisoner committed or intended to commit any felony other than the felony of homicide That he intended to inflict a personal injury upon the deceased, is admitted. But an assault and battery upon another is a misdemeanor, except only in the cases where by statute the offence is made a felony. This was so at common law, and the offence was a misdemeanor simply, although the assailant may have had a felonious intent; as an intent to murder or to rob when he inflicted the injury. If the felony attempted was accomplished, then the misdemeanor was merged in the higher offence.

The Revised Statutes declare (2 R. S., 665, § 36) that "Every person who shall be convicted of * * * an assault and battery upon another, by means of any deadly weapon * * * with the intent to kill, maim, ravish or rob such other person, or in an attempt to commit any burglary, larceny or other felony, * * * shall be punished by imprisonment in a State prison for a term of not more than ten years."

The offences described in this section are felonies within the meaning of that term, as used in the statute defining the crime of murder. (2 R. S., 702, § 30.)

Opinion of the Court, per ANDREWS, J.

If the prisoner was engaged in the commission of any felony other than homicide when he struck the deceased, it must have been one described in this section, as an assault and battery is not made a felony in any case not within it.

We have not overlooked the act of 1854 (chap. 74), which makes an *assault* with "any knife, dirk, dagger or other sharp, dangerous weapon," etc., punishable by imprisonment in the State prison or in a county jail. This offence is not a felony within the statute or at common law, and the act relates to assaults only, and with an instrument different from the one used by the prisoner. (*Fassett* v. *Smith*, 23 N. Y., 252.)

And we have no comprehensive statute like that of 9 Geo. IV., chap. 31, which makes an unlawful wounding with intent to do some great bodily injury a felony.

None of the specifications in the section of the statute relating to felonious assaults are applicable to this case, unless the act of the prisoner can be construed to have been an assault with attempt to maim.

Unless the prisoner was guilty of an attempt to commit that felony, there is no other to which his act can be referred, except that of murder in the first degree or manslaughter.

The prisoner intentionally aimed a blow at the head of the deceased with a dangerous weapon, and with a force likely to fracture the skull, and which in fact did crush it, and it is insisted that upon this evidence, and in the absence of any proof of antecedent or subsequent facts tending to establish it, the jury might have found that the prisoner's intent was to fracture the skull or injure the head, and not to kill, and if such intent had been found, there was an assault with an attempt *to maim*, within the statute. *Mayhem* at common law is defined by Blackstone as the violently depriving another of the use of such of his members as may render him less able in fighting either to defend himself or to annoy his adversary. (4 Black., 204.)

It was recognized as a felony at a very early period of the common law, and the offender was punished by the loss of the

same member of which he had deprived the party maimed: *membrum pro membro.*

It was treated as an offence against the State, for the reason assigned by Lord COKE (1 Inst., 127): "For the members of every subject are under the safeguard and protection of the law, to the end a man may serve his king and country when occasion shall be offered."

The special injuries which constitute *mayhem* are stated, by Hawkins, as follows:

"And therefore the cutting off or disabling or weakening a man's hand or finger, a striking out his eye or foretooth, or castrating him, are said to be maims; but the cutting off his ear or nose are not esteemed maims, because they do not weaken, but only disfigure him." (1 Hawkins' Pleas of the Crown, 107.)

And Blackstone treats it as an injury resulting in a permanent disability, and says it is attended with this aggravating circumstance, that thereby the party injured "is forever disabled from making so good a defence against future external injuries as he otherwise might have done." (3 Bl., 131.)

An injury to the head or skull is not specified by Hawkins or Blackstone as *mayhem;* and as the usual consequence of such an injury is either death or temporary disability, it does not seem to be embraced within the definition of that crime as given by these commentators.

In the definition of *mayhem* by Lord Coke, the breaking of the skull is included.

"Mayhem," he says, "signifieth a corporal hurt, whereby a man looseth a member by reason whereof he is less able to fight, as by putting out his foretooth, *breaking his skull,* striking off his arm, hand or finger, cutting off his leg or foot, or whereby he looseth the use of any of his said members." (Coke Litt., 288 *a.*)

And Lord COKE refers to the authority of Glanville and Britton in support of this definition:

"Mayhem," says Glanville, "signifies the breaking of any bone or injuring the head by wounding or abrasion. In such

case the accused is obliged to purge himself by the ordeal, that is, by the hot iron, if he be a freeman; by water, if he be a rustic." (Glanville, Blain's translation, book 14, chap. 1, 350; see, also, Britton, Nichols' translation, liv. 1, chap. 26, fol. 48 *b*, 49 *a*, 123.)

Some recognized instances of mayhem are omitted in Glanville's definition, and it would seem to include any injury to the head, however trivial. But no authority has been cited, subsequent to the time of Lord COKE, nor has any come to our notice, for the proposition that a fracture of the skull is mayhem, except that Mr. East, in his Pleas of the Crown (p. 393), after giving the general definition of mayhem at common law, and instances in illustration of it, concludes, "or, as Lord COKE adds, breaking the skull."

But whatever acts may have been recognized as mayhems, at a remote period of the common law, the crime and the punishment became the subject of statute definition and regulation. Some statutes had been passed upon the subject prior to the reign of Car. II, but the first general and comprehensive one was the statute 22 and 23 Car II, chap. 1, entitled "An act to prevent malicious maiming and wounding."

Chitty speaks of it as the most important and extensive ancient statute upon this subject. (Criminal Law, vol. 3, 785.) And Blackstone says that this and the prior statutes "put the crime and punishment of mayhem more out of doubt." (4 Bl., 206.)

By this statute it is enacted that any person who "shall on purpose and of malice aforethought, by lying in wait, unlawfully cut out or disable the tongue, put out the eye, slit the nose or lip, or cut off or disable any limb or member of any subject, with intention in so doing to maim or disfigure him in any of the manners aforesaid," shall be guilty of felony without benefit of clergy.

Whatever may have been the law of *mayhem* in England antecedent to this statute, no case can be found, we think, arising since its enactment, in which an injury to the head,

or any act or injury, has been regarded as *mayhem*, other than the acts and injuries enumerated in this statute.

It has been regarded as defining what before may have been uncertain. And it was held in *Rex* v. *Lea* (1 Leach, 51), where a husband had cut the throat of his wife quite across, that it was not maiming within this statute.

The act of Car. II has been the basis of the legislation of this State on the subject of maiming.

The first act was passed in 1788, and is entitled "An act to prevent malicious wounding and maiming."

This act was followed by the act of 1801 entitled "An act to prevent malicious maiming," which latter act was substantially a re-enactment of the former, except in respect to punishment.

In both statutes the enumeration and description of the injuries which are made punishable is the same as in the English statute, and no others are included.

The Revised Statutes (2 R. S., § 36, 665) declare "that every person who, from a premeditated design, etc., shall, first, cut out or disable the tongue; or, second, put out an eye; or, third, slit the lip or destroy the nose; or, fourth, cut off or disable any limb or member of another on purpose, upon conviction thereof, shall be imprisoned in a State prison," etc.; following the enumeration in the previous statutes.

The statute of Car. II has been followed, also, in the legislation by congress and of many of the States of the Union. (See collection of statutes in Wharton's Criminal Law, title "Mayhem.")

We are of opinion that since that statute the crime of *mayhem* includes those injuries only which are therein enumerated, and that the section of the Revised Statutes above cited was intended as a statute definition of that crime.

It does not declare, in terms, that the acts therein enumerated constitute maiming; but the section is contained in the article entitled "Of rape, maiming, etc.," and the injuries are those which are generally known as maiming, and it includes

all the cases which, since the time of Lord COKE, have come within that designation.

In *Reg.* v. *Sullivan* (1 C. & Marsh, 209) the prisoner was indicted under the act of 7 Wm. IV and 1 Vict., ch. 85, which enacted that any one who shall stab, cut or wound any person, with intent to *maim*, disfigure or disable such person, or to do some other grievous bodily harm, etc., shall be guilty of felony.

It appeared in the evidence that the prisoner with an ax struck the prosecutor on the head with the edge of it, and inflicted a cut upon it.

PARKE, B., in charging the jury, said: "There is no proof of an intent to maim or disable, as the blow was aimed at the head of the prosecutor. It would have been otherwise if it had been aimed at the arm, to prevent his being able to use it. The question, therefore, will be whether there was a wounding with intent either to murder the prosecutor or to do him some grievous bodily harm."

This is a direct authority, and the opinion of an eminent judge, in support of the views herein expressed.

It is to be observed, moreover, that the case did not arise under the statute of Charles, which was repealed by St. 9 Geo. IV., ch. 31; so that it stood upon the construction of the words "to maim," in the statute of Victoria.

We might here close the consideration of this case; but we are of opinion that the result would not be changed although it should be held, according to Lord COKE's definition, that breaking of the skull is or might be a maiming.

The refusal of the court to charge that if the prisoner intended to maim, and not to kill, the offence was murder in the second degree, was proper, for the reason that there was no evidence upon which the jury could have found that the prisoner intended to fracture the skull of the deceased, as distinguished from an intent to kill him.

The request assumes that the prisoner acted, in striking the blow after having formed an intent, as to the extent of the injury to be inflicted.

Opinion of the Court, per ANDREWS, J.

His act was a blow with an iron bar upon the head of the deceased, with a force which crushed the skull and drove it in upon the brain.

There was no evidence from which his intent could be ascertained, except what was furnished by the facts preceding the assault, and by the act itself and its results.

It is a fundamental rule of evidence, of very general application, founded upon observation and experience, that a man is presumed to intend the natural consequence of his acts.

In this case death ensued, as it was likely to ensue, from the act of the prisoner.

And while it was for the jury to determine with what intent the blow was inflicted, we cannot, without doing violence to common sense, say that the prisoner may have intended to break the skull of Putnam without producing death.

Such an intent cannot be predicated of his act, and there is no evidence to establish it.

If the prisoner acted from premeditation he may have intended to kill the deceased or simply to do him a bodily injury; but that he intended the particular injury of breaking the skull only, cannot be inferred.

If a blow aimed at an arm is by accident deflected from its course and inflicts a mortal wound, in such or similar cases, an intent to maim only might be found by the jury; and if, in this case, death had not resulted the prisoner might, perhaps (assuming that the fracture of the head was a maiming), have been convicted of an intent to maim. (East's Pleas of the Crown, title "Mayhem," Vict. I, 400; *Rex* v. *Cooke*, 1 St. Tr., 54.)

But the request to charge was irrelevant and inapplicable to the facts, and the court was justified in refusing to grant it.

The jury have by their verdict found that the prisoner, when he struck the blow, intended to kill the deceased.

By necessary inference the jury must have found that the prisoner was not, at the time of the act, engaged in the commission of any felony other than the homicide of which he was convicted.

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If the court erred in refusing to charge as requested, yet it does not appear that the prisoner could have been prejudiced thereby; and especially, in view of the further fact, that the court charged that, unless the intent to kill was found, the prisoner could be convicted of manslaughter only. But we prefer to rest our decision upon the other grounds indicated.

After a careful consideration of the questions of law arising upon this record, we are of opinion that the judgment must be affirmed.

The question is new, and the case is a proper one to have been brought here for final adjudication; and while no errors are trivial in a judgment involving life, it is to be remembered that the law of murder is designed for the protection of life from lawless violence, and its sanctions ought not be weakened by reversing convictions upon objections which are unsustained by reason or authority.

The judgment is affirmed.

All concur.

Judgment affirmed.

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HENRIETTA YATES COHEN, Appellant, *v.* THE NEW YORK MUTUAL LIFE INSURANCE COMPANY, Respondent.

The policy of the law is to mitigate the severity of war, and to relieve citizens, as far as consistent with the interests of the government, from the hardships incident thereto.

The annual premiums paid during the first years of a life policy of insurance are not simply payments for the risk incurred from year to year, but are in excess of the actual risk, and this excess is so much paid in advance for the later years, in case of a prolonged life. The contract, while it is executed by the insured, by the payment of the annual premiums from year to year, is wholly executory upon the part of the insurer. It is a continuing contract, in the sense that it is to be performed in the future, but it is not a contract of continuance in its performance. The act required of the insured is a single act, to be performed at stated periods, and that to be performed by the insurer is single, *i. e.*, the payment of a specified sum upon the happening of a certain event. Such a contract, lawful in its inception,

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between the citizens of different States, and where large sums have been paid for premiums, is not dissolved by war between the States. The contract remains; the remedy simply is suspended, but revives with the return of peace.

The occurrence of war between the two States forbids and prevents the transmission of money for payment of the premiums from one State to another, and legally excuses the payment. A condition, therefore, in a life policy forfeiting it and all payments made thereon in case of non-payment of the annual premiums as they fall due, is suspended during the existence of the war, and a tender, after its termination, of the premiums unpaid, with interest upon each from the time it fell due, revives the policy.

An incorporated life insurance company, although organized upon the mutual plan, is not a partnership, and when it has policy-holders in different States it is not dissolved by war between the States.

Although in ordinary cases the courts will not, in advance of any present duty declare the rights and obligations of suitors, yet they will do so where peculiar circumstances render it necessary to the preservation of right.

Plaintiff's complaint alleged, in substance, that defendant, a corporation organized in the State of New York, in 1849, issued to plaintiff, a resident of the State of Georgia, a life policy upon the life of her husband, which policy contained a clause that, in case of non-payment of the annual premiums, "the said policy should cease and determine," and "all previous payments made thereon should be forfeited to the company;" that the annual premiums fell due upon the second of April in each year, and were paid regularly up to and including the year 1861; that plaintiff was ready and willing to pay the premium falling due April 2d, 1862, and those falling due during the existence of the civil war; that, in consequence of the war, all intercourse was interrupted and forbidden by the laws of the United States, and she was thereby prevented from making payment; that, as soon as communication was re-established after the war, she tendered payment of the accrued premiums, but defendant refused to receive them, declaring the policy forfeited. Plaintiff asked that she be allowed to make the payments and the policy be declared valid, or that defendant be compelled to pay back the premiums paid, with interest, and the dividends, etc. Defendant demurred, that the court had no jurisdiction, and that complaint did not state a cause of action. Judgment was rendered sustaining demurrer. *Held*, that the contract was not dissolved, but suspended, by the war; that the payment of the premiums during its existence was legally excused, and the tender revived the policy; that although there has been no loss, yet as there is an actual controversy, and the only parties to it are before the court; as the present rights of plaintiff under the contract are denied; as the contract of life insurance is a peculiar one; and as it is fit and proper the parties should know their rights

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under the contract, the case was a proper one for the exercise of the equitable powers of the court; and that the judgment was therefore error.

(Argued September 14, 1871; decided December 24, 1872.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order affirming order of Special Term sustaining demurrer to plaintiff's complaint.

The complaint alleged in substance that defendant was a corporation, organized under the laws of the State of New York; that on the 2d of April, 1849, in consideration of $150 paid them by plaintiff, and of annual premiums of that amount, to be paid thereafter, it executed and issued to her a policy of insurance upon the life of her husband, Octavus Cohen, in the amount of $5,000, for the term of his natural life; that the policy contained the conditions that if the said Octavus Cohen should enter into any military or naval service whatever (except the militia not in actual service), or should die by his own hands, or in consequence of a duel, or by the hands of justice, or in known violation of the laws of any of the States, or of the United States, etc., then said contract or policy should be void. Also, if plaintiff should not pay the said annual premiums, on or before the several days mentioned in the contract, then the company should not be liable for the sum assured, or any part thereof, and that said policy should cease and determine, and also that all payments made thereon should be forfeited to the company; that plaintiff paid the annual premiums, as required by the policy, up to and including the payment due April 2d, 1861; that she was ready and willing to pay the premiums falling due in April, 1862, 1863 and 1864, but that she being a resident of Georgia, and as in consequence of the civil war then pending between the southern States and the government of the United States all intercourse between the citizens of the two sections was interrupted and forbidden by the laws of the United States,

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she was prevented from making such payments; that, as soon as communication was re-established, and in December, 1864, she tendered to defendant the premiums that had accrued during the war, but defendant refused to receive the same, and declared the said policy canceled and forfeited. She asked as relief that she might be permitted to make the payments, and that her policy be declared valid, or that defendant be compelled to pay back to her all sums paid upon the policy, with interest, and all dividends declared under the policy, or for such other and further relief, etc.

1. That upon the face of the said complaint it appears that the court has no jurisdiction of the subject of this action.

2. That upon the face thereof it appears that the said complaint does not state facts sufficient to constitute a cause of action.

Joseph H. Dukes for the appellant. Mandamus was not a proper remedy. (*Rex* v. *Bank of England*, 2 Barn. & Ald., 620; *Rex* v. *London Assurance Co.*, 5 id., 899; *Rex* v. *Bencher Lincoln's Inn*, 4 B. & C., 855; *Rex* v. *Barnard's Inn*, 5 Ad. & Ellis, 23; *People* v. *Supervisors of Chenango Co.*, 11 N. Y., 573; *Ex parte Fireman's Ins. Co.*, 6 Hill., 24; Angell & Ames on Corporations, § 390; *King* v. *Freefisher's Co.*, 7 East, 353; Grant on Corporations, 290; *People* v. *Mayor of N. Y.*, 10 Wend., 395.) This case is a proper one for the exercise of the equitable powers of this court. (1 Spence Eq. Jur., 433; 2 Story Eq., § 826; *Hochester* v. *De La Tour*, 2 Ellis & Black., 679; *Crist* v. *Armour*, 34 Barb., 378; *Robinson* v. *Cropsey*, 2 Edw. Ch., 138.) Plaintiff is not obliged to wait until the death of the assured to bring this action. (*Taylor* v. *Neville*, 3 Atkyns, 383; *Ball* v. *Coggs*, 1 Brown Parl. Cases, 140; 2 Chitty Gen. Practice, 853–855.) Acquiescence and lapse of time would be a bar in equity to a recovery hereafter. (*Gibson* v. *Fletcher*, 1 Rep. Ch., 32; *Goddard* v. *Goddard*, id., 74; 1 Spence Eq. Jur., 631; Story Eq. Jur., §§ 1520–1522.) The contract was not dissolved by the war, but suspended, and the non-payment of premiums

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during the war was legally excused. (*Doughty* v. *Neal*, 1 Saunders Rep. [n.], 216; *Wolfe* v. *Howes*, 20 N. Y., 197; *Jones* v. *Judd*, 4 Coms., 411; *Crist* v. *Armour*, 34 Barb., 378; *Cornwell* v. *Haight*, 21 N. Y., 462; *Crary* v. *Smith*, 2 Comst., 60; 2 Wildman's Int. Law, 8, 15; 1 Kent Com., 74; act congress, July 13, 1861, Laws U. S., vol. 12, p. 257. § 95; President's proclamation, 16 August, 1861; 3 Phill. Int. Law, 729, 735; *Monongahela Ins. Co.* v. *Chester*, 43 Penn.; *Conway* v. *Gray*, 10 East., 536; *Wood* v. *Edwards*, 19 Johns., 205.)

H. E. Davies for the respondent. The proper remedy in this case is by mandamus. (*O'Reilly* v. *Mut. L. Ins. Co.*, ROBERTSON, Ch. J., and cases cited.) This court cannot declare in advance defendant's liability upon the policy held by plaintiff. (*Brooke* v. *Ld. Kensington*, 2 Kay & J. R., 753; *Grove* v. *Bastard*, 2 Ph. Ch. Cases, 619; *Jenner* v. *Jenner*, Law Rep., 1 Eq., Pt. III, 361; *Baylies v. Payson*, 5 Allen Rep., 488; Bell's Principles, etc., § 2252; *Scott* v. *Onderdonk*, 14 N. Y., 13.) The payment of the premium specified in the policy is a condition precedent to the obligation assumed by defendant. (4 Kent Com., 141; 2 Black. Com., 154; *Ughland's Case*, 7 Coke; *Holdipp* v. *Otway*, 2 Saund., 106; *French* v. *Campbell*, 2 H. Bl., 178; *Wood and others* v. *Nasby*, 6 T. Rep., 710; *Oldman* v. *Bewicke et al.*, 1 H. Bl., 577, note; *Routledge* v. *Burrell*, id., 254; *Scott* v. *Tyler*, 2 Bro. Ch. C., 455; Co. Litt., 206, *a*, *b*; 217 *b*; 218, *a*; *Popham* v. *Banfield*, 1 Vern., 83; *Bertrie* v. *Ld. Falkland*, 3 Ch. Ca., 129; 2 Vern., 333; *Pike* v. *Butler*, 4 N. Y., 360; *Moore* v. *Western F. Ins. Co.*, 12 Wend., 452; *Fowler* v. *Ætna Ins. Co.*, 6 Cowen, 673; *Duncan* v. *Sun Fire Ins. Co.*, 6 Wend., 488; 7 Cowen, 649; *Norton* v. *R. and S. Ins. Co.*; *Cornell* v. *Le Roy*, 9 W end., 163, and authorities cited in these cases; *Moakley* v. *Riggs*, 19 Johns., 72; *Taylor* v. *Cullen*, 6 Cowen. 624; *Owen* v. *Farmers' Joint Stock Co.*, 57 Barb., 518; *Van Horne* v. *Dorrance*, 2 Dal., 317; *Dermott* v. *Jones*, 2 Wall., 1; Co. Litt., 206, 218;

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1 Atkyns, 374, 576; Com. Rep., 732; *Nightingale* v. *State Mut. Ins. Co.*, 5 R. I., 38; *Brown* v. *Overbury*, 34 Eng. L. and Eq. Rep., 610; *Scott* v. *Avery*, 36 L. and Eq. Rep., 1; *Campbell v. Am. Pop. Ins. Co.*, Transcript, Feb. 11, 1871; *Lathrop* v. *Greenfield Ins. Co.*, 2 Allen, 82; *Beadle* v. *Chenango Mut. Ins. Co.*, 3 Hill, 161.) All conditions are strictly construed. (Bunyan on Life Insurance, 69, 165; *Vyse* v. *Wakefield*, 6 Mees. & Wels., 442.) When the premium on the policy ceased, the insurance also terminated. (*Patterson* v. *Powell*, 9 Bing., 329; Bunyan on Insurance, 1, 66; *Want* v. *Blunt*, 12 East., 183; 1 Bos. & P., 471; *Phillips* v. *Eastwood*, L. & G., 291; *Mut. Ben. Life Ins. Co.* v. *Ruse*, 8 Ga., 534; 1 Bigelow's Rep., 83; *Howell* v. *Knickerbocker Life Ins. Co.*, 3 Robertson, 232; 1 Bigelow's Rep., 578; *Robert* v. *New England Mut. Life Ins. Co.*, Disney, 353; 1 Bigelow, 634; *Catoir* v. *Am. L. & T. Co.*, 4 Vroom, 487; *O'Reilly* v. *Mut. Life Ins. Co.*, S. C., Nov. 22, 1868, ROBERTSON, C. J.; *Cohen* v *Same*, S. C., June, 1868; *Koelges* v. *Guardn. L. Ins. Co.*, 2 Lans., 480.) The war terminated the policy, and no act to be done during its continuance could revive or continue it. (1 Duer's M. Ins., 417, 431; Phil. Ins., 1, § 223; The Emulous, 1 Galls., 594; 3 Kent Com., 255; *Burton* v. *Towers*, 6 T. R., 35; *Furtado* v. *Rogers*, 3 Bos. & P., 191; *Gamba* v. *Le Messurier*, 4 East, 407; *Brandon* v. *Curling*, id., 410; *Bell* v. *Gibson*, 1 Bos. & P., 345; *Odline* v. *Penn. Ins. Co.*, 2 Wash. C. C. R., 321; *Gray* v. *Lewis*, 3 id., 280; *The Julia*, 8 Cranch, 181; *The Rapid*, id., 160; see, also, *The Caledonian*, 4 Whea., 100; *Carrington* v. *Merchants' Ins. Co.*, 8 Peters, 495; *Flindt* v. *Waters*, 15 East, 260; *Harmon* v. *Kingston*, 3 Campb., 153; *Potts* v. *Bell*, 8 Term Rep., 548.) The tender of the premium to the agent gave the plaintiff no rights. (*Howell* v. *Gordon*, 40 Ga., 302; *White* v. *Madison*, 21 N. Y., 117; *Treadway* v. *Ham. Mut. Ins. Co.*, 29 Conn., 69; *Mut. Ins. Co.* v. *Deane*, 18 Md., 48; *White* v. *Haight*, 16 N. Y., 310; *Hart* v. *Achilles*, 28 Barb., 576.) Plaintiff paid the premiums voluntarily, and she cannot maintain an action

for them. (*Fleetwood* v. *City of New York*, 2 Sand. S. C. R., 475; *Silliman* v. *Wing*, 7 Hill., 159; *Supervisors of Onondaga County* v. *Briggs*, 2 Denio, 26–39, and cases there cited.)

ALLEN, J. A decision of this appeal has been delayed at the request of parties to other actions pending in this court, like in character in some respects to this, that before the questions involved should be decided, their appeals might be heard.

The importance of the questions at issue induced the court to listen to the request, and this case was substantially re-argued, with *Sands* v. *The New York Life Ins. Co.*, in December last. (*Post* page, 626.)

The legal status of citizens of States at war, and the relation they mutually occupy, as well as the effect of a state of war upon contracts and obligations of the subjects of litigant States, and their right to contract or hold intercourse with each other, have recently been so frequently the subject of judicial discussion and decision in the State and federal courts, that the leading principles by which the intercourse and dealing between enemies, that is, between the inhabitants of States and nations at war, are prohibited or restricted and regulated, and the effect of war upon their mutual contracts and obligations, are quite familiar.

They have been so often repeated in different forms, that a review of them, or a reference at much length to them, would be out of place.

The general principles and doctrines, as found in the treatises of writers upon public law and deducible from the judgments of courts, are firmly established and cannot be ignored or essentially modified by courts at this day. All that courts have to do is to apply the principles thus recognized and settled to cases as they arise. It is said in general terms that, in a state of war, "the individuals who compose the belligerent States exist, as to each other, in a state of utter occlusion," and all intercourse between them is forbidden. (Per

JOHNSON, J., *The Rapid*, 8 Cranch, 155.) This proposition has been repeated with approval in several later cases. Judge NELSON, in the *Prize Cases* (2 Black., 635, 687), adopting the language of approved writers on international law, says that one of the legal consequences resulting from a state of war is that "the people of the two countries become immediately the enemies of each other; all intercourse, commercial or otherwise, between them unlawful; and all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemies' property, the drawing of bills of exchange or purchase on the enemies' country, the remission of bills or money to it, are illegal and void; all existing partnerships between citizens or subjects of the two countries are dissolved; and, in fine, interdiction of trade and intercourse, direct or indirect, is absolute and complete by the mere force and effect of the war itself." (See, also, *Jecker* v. *Montgomery*, 18 How., 110; *Hanger* v. *Abbott*, 6 Wallace, 532; *The Onachita*, id., 521; *Griswold* v. *Waddington*, 16 J. R., 438.) These propositions, general and far reaching as they are, were, however, made in cases relating to commercial intercourse, and involved the question as to the legality and effect of commercial dealings and transactions; and the general language used, in legal effect, extends only to intercourse and dealings of that character, although all other intercourse, clearly within the mischief intended to be avoided, would be within the principle, and therefore within the rule itself. I do not understand that it has been authoritatively adjudged that all private contracts without exception, made between citizens or subjects of States at war, are necessarily void, although the language of the courts has been sufficiently comprehensive to include the proposition in its largest extent. The subject is elaborately and ably considered in *Kershaw* v. *Kelsey* (100 Mass., 561), and the authorities, with the reason and extent of the rule under consideration, reviewed and discussed; and the result of the examination was that the law of nations, as judicially declared, prohibits all intercourse

between citizens of the two belligerents, which is inconsistent with the state of war between those countries. This was regarded as including every act of voluntary submission to the enemy, or receiving his protection; any act or contract which tends to increase his resources, and every kind of trading or commercial dealing or intercourse, direct or indirect. The act of congress of July 13, 1861 (12 U. S. Stat. at Large, 257), and the proclamation of the president, pursuant to that statute, only prohibited commercial intercourse between the citizens of the States declared to be in insurrection and the citizens of the rest of the States.

For all the purposes of this action it may be assumed that this rule, thus restricted, would prohibit the making of a contract during a state of war for the insurance of the life of an enemy. This was rather assumed by the counsel for both parties upon the argument. It would certainly forbid the transmission of money for the premium from one of the States at war to the other; and it is said that the life of an alien enemy cannot be insured by his creditor, although the latter be a subject of the same country with the insurer. (Bunyon's Life Assurance, 19.) The authorities cited to sustain this proposition were all, however, cases of insurance upon merchandise. (*Harman* v. *Kingston*, 3 Camp., 150; *Potts* v. *Bell*, 8 T. R., 548; *Flindt* v. *Waters*, 15 East, 260.) The insurance upon the life of the husband of the plaintiff was a valid and lawful contract at the time it was made in 1849, and was "for the term of his natural life," in consideration of a sum paid at the date of the policy, and the further consideration of the annual payment of a like sum on or before the second day of April in every year. This was not a policy from year to year, but an insurance for life, subject to be defeated by the non-performance of the condition prescribed, to wit, the payment of the annual premium. It is expressly declared in the contract of insurance that if the annual payments should not be made, "that said policy should cease and determine," and "that all previous payments made thereon should be forfeited to the company." It was a life

policy. (*Hodsdon* v. *Guardian Life Ins. Co.*, 97 Mass., 144; *Reese* v. *Mutual Benefit Life Ins. Co.*, 26 Barb., 556; *N. Y. Life Ins. Co.* v. *Clopton*, 7 Bush. [Ky.] R., 179.) The contract was not, as to all its stipulations and as to both parties, executory. It was executed by the plaintiff by the payment of the annual premiums from 1849 to and including 1861, while it was wholly executory on the part of the defendant, its undertaking being to pay the amount specified upon the death of the insured. It is no answer to say that the plaintiff had only paid for the risk incurred from year to year. The annual premium paid during the first years of a life policy is in excess of the actual risk; and this excess is so much paid in advance for the greater risk during the later years in case of a prolonged life. The insurers would be greatly the gainers by avoiding all life policies upon young lives after the payment of the annual premiums for ten or fifteen years, terminating the risk before the greater hazard of loss, the result of advanced age, has been incurred. The contract was a continuing contract in the sense that it was to be performed in the future; but it was not a contract of continuance in its performance. The act to be performed by the defendant was a single act, the payment of a specified sum upon the happening of a certain event, and, in this respect, was like a covenant or promise to pay a sum of money at a day certain, or upon any condition lawful in itself. There is no pretence that a contract of the latter kind would be dissolved by war. The contract would remain; the remedy would be suspended. The act to be performed by the plaintiff was a single act, to be performed at stated periods, and was not like the contract of partnerships and some other contracts which are continuous in their performance. In the case of a marine insurance, or a contract of affreightment, a war might act as a dissolution and put an end to them. The first is upon enemies' property, and an insurance is in support of their commerce, and entirely inconsistent with the allegiance due to the government of the underwriter. As to such a contract, the authorities say the insurance terminates abso-

lutely, and at once, by the very act of war, and the parties are in the same condition as if no contract was made; the one loses the premium, and the other his security against loss. But the rule will hardly apply to a life policy when large sums have been paid for premiums. There is nothing in the policy of the law, or the interests of the public, calling for an enforcement of the law of confiscation incident to a state of war, after the war has ceased and the people of the two belligerent nations have again become one, solely for the benefit of one of two contracting parties by the forfeiture of the rights of the other. This would be simply a confiscation of property after war had ceased, at the instance and for the benefit of individuals. By the payment of the annual premium in April, 1861, the life was insured until April, 1862. The engagement of the defendant was then lawful, and was to the effect that the company would pay the plaintiff $5,000 upon the death of her husband within the year. A promissory note in that form, made upon a good consideration, would be obligatory; and if the death occurred within the year, although after war had intervened, the right of action would be suspended during the war, but would revive with the return of peace. There is no reason apparent why the promise to pay money upon the termination of a specified life should necessarily be terminated by the happening of war between the States, of which the parties are respectively subjects, as unlawful and inconsistent with the state of war merely because it is called an insurance upon life. The policy in this instance protects the insurers, and makes void the policy, if the insured enter any military or naval service or dies in the known violation of the laws of the United States, so that the risk was not increased by the state of war, nor the ability of the enemy to fill up the ranks of its army and navy affected by the insurance upon the life of its citizens. Those insured would rather be deterred from taking up arms against the United States lest their policies should be avoided.

Had the insured died at any time before April, 1862, I

think there can be no doubt that the contract would have been regarded as one of those which, lawful when made and executed by the one party, are not dissolved, but merely suspended by the existence of war, and that a recovery could have been had at the close of the war. The contracts between the individuals of belligerent States are necessarily suspended during the war of those States, but are not annulled. (Phill. Int. Law, 666; per NELSON, J., *Prize Cases, supra.*) Mr. Wheaton says commercial partnerships are dissolved by the mere force and act of war, though, as to other contracts, it only suspends the remedy. (Wheat. Int. Law, 8th ed., 403, § 317.)

This is upon the principle that the State and not the individual wages war. The question then remains, whether the non-payment of the annual premium during the years 1862, 1863 and 1864 involved a forfeiture of the policy and of all payments before then made. That such would be the effect of the non-performance of the condition, unless waived or legally excused, is not disputed; and unless the performance was waived by the defendant, or is legally excused by the existence of the war, the plaintiff must fail in her action and submit to the loss resulting from the forfeiture. It must be borne in mind that the war was the act of the States, and that individual citizens are not identified with their governments so as to expose them to the rule of law that he who, by his own conduct, prevents the fulfillment of a contract or renders its performance impossible, shall not take advantage of a non-performance on the other side or excuse the non-performance upon his part. (*Odlin* v. *Ins. Co. of Pennsylvania*, 2 Wash. C. C. R., 312; *Francis* v. *The Ocean Ins. Co.*, 6 Cow., 404; S. C., in error, 2 W. R., 64.) The condition of affairs which made the payment of the premium by the plaintiff during the years named unlawful, and therefore impossible, was not created by the act or default of the plaintiff but resulted from the acts of the governments of which the respective parties were subjects. There is a manifest distinction between mere impediments and difficulties in the

way of the performance of a condition and an impossibility created by law or the act of the government. This is clearly recognized in *Wood* v. *Edwards* (19 J. R., 205); *People* v. *Bartlett* (3 Hill, 570). An individual by his covenant may undertake, as against his own acts and the acts of strangers, but not against the acts of God or his government or of the obligee. (See per NELSON, Ch. J., *People* v. *Bartlett*, *supra*.) In *Wolfe* v. *Howes* (20 N. Y., 197) the performance of the undertaking became impossible by the act of God in the death of the party, and performance was held excused upon the ground that the parties must be deemed to have made this an exception by implication. So, too, a party is excused from the performance of his covenant when the performance is made unlawful by act of parliament. If made absolutely unlawful, it operates to repeal the covenant; if only temporarily unlawful, it suspends the operation. (*Brewster* v. *Kitchin*, 1 Ld. Raymond, 317.) Lord ALVANLEY, Ch. J. (in *Touteng* v. *Hubbard*, 3 B. & P., 291), says: "But when the policy of the State intervenes and prevents the performance of the contract, the party will be excused." That which will avoid a covenant will nullify a condition, and *vice versa*. (Platt on Cov., 569; *Doughty* v. *Neal*, 1 Saund., 216, note 2.) The policy of the law is to mitigate the severity of wars and relieve citizens, so far as consistent with the interests of the government, from the hardships incident to it; and, *a fortiori*, the stringent and severe rule invoked by the defendant should not be applied in a doubtful case so as to produce extreme hardship, when, by adopting a milder and more equitable rule each of the contracting parties will secure equal and exact justice and all their legal and equitable rights. The operation of the statute of limitations is held suspended during the period of the war by reason of the inability to enforce the claim, and this is in harmony with the benign tendency of the age, the result of advanced civilization. *Hanger* v. *Abbott* (6 Wal., 532), Judge CLIFFORD says: "Neither laches nor fraud can be imputed in such a case." At the time of making the contract in this case the plaintiff had the legal

right and ability to make the annual payments, but the effect of the war was to make the attempt unlawful without any fault on her part. The operation of a condition, as express and absolute as in this case, was held suspended during the war, in *Semmes* v. *Hartford Ins. Co.* (13 Wal., 158). The condition there, as here, was by the act and agreement of the party, and yet its performance being impossible it was held to be inoperative and the time for bringing the action extended, notwithstanding the agreement of the parties, by the mere act and effect of the war. It was held that the disability to sue, imposed on the plaintiff by the war, relieved him from the consequences of failing to bring suit within the time specified in the policy. The same principle would relieve the present plaintiff from the consequences of failing to make the annual payments by the day. She was guilty of no laches, and why subject her to a forfeiture? No injustice is done the defendant in this case by permitting the plaintiff to make, now, the payments which she could not lawfully make between 1861 and 1865.

The interest will compensate for the non-payment at the time, and the defendant, in legal contemplation, will be precisely in the situation it would have been had the money been paid on the law day. *Manhattan Life Ins. Co.* v. *Warwick* (20 Grattan, 614); *N. Y. Life Ins. Co.* v. *Clopton* (7 Bush [Ky. R.], 179); *Hamilton* v. *N. Y. Mut. Ins. Co.*, recently decided in the Circuit Court of the United States, in the southern district of New York, are precisely in point, and, if followed, decisive of this case. The reasonings of the prevailing opinions in these cases abundantly sustain the judgments. The case comes before us on demurrer to the complaint, and if there are any equities or any facts which would deprive the plaintiff of the rights to which the case made by the complaint entitles her, the defendant may set them up by answer.

It was also claimed that the defendant being a mutual company, of which all holders of policies were members, it was a partnership which was dissolved by the war.

Opinion of the Court, per ALLEN, J.

Trading and commercial partnerships, and perhaps all partnerships, are dissolved by war between the States of the several partners. But whatever analogies there may be between mutual companies and ordinary partnerships, and the relation of the members of the two organizations, an incorporated company, although organized upon the mutual principle, is in no proper or legal sense a partnership. The defendant is a body politic and corporate, capable of contracting and of suing and being sued, and the relation between the plaintiff and the corporation is that of insured and insurer; and the rights and duties of the contracting parties are to be governed and determined by the terms of the policy by which the insurance is effected, as in other cases. Other and incidental rights are secured to the plaintiff as a member of the company, one of the corporators; but this does not make the members partners as between themselves or affect the express contract of the corporation. If it was a partnership as claimed, and dissolved by the war, the plaintiff has not forfeited her share in the assets of the copartnership, but is entitled to an accounting as of the day of the dissolution, and to her due proportion of the property and assets. This would lead to a result not desired by the defendant.

The defendant also objects to the right of the plaintiff to maintain an action at this time, there having been no loss, and, therefore, no cause of action upon the policy. The allegations of the complaint are that the plaintiff has tendered the premiums due, and that the defendant refused to receive them, and declared the policy canceled and forfeited. This is a peculiar case; and there are many reasons, unless there is some rigid rule forbidding the court to entertain jurisdiction, why it should determine the matters in controversy at this time. 1. There is an actual controversy existing, and the only parties to it are before the court. There is not the reason for declining jurisdiction that presented itself in some of the cases cited by the defendant, as in *Grove* v. *Bastard* (2 Phi. [Eng. Ch., 22], 619), that all the parties in interest could not be heard and their rights determined. 2. Present

rights, under the policy and incident to it, are denied the plaintiff. Her policy having been declared forfeited and canceled, she is excluded from the privileges and denied the rights which belong to her as a member of the company. She is entitled, unless the claim of the defendant is well grounded, at once and at all times to the privileges of other policy-holders, and to be recognized as such. 3. The plaintiff is entitled, if the right to pay the premiums and continue the policy still exists, to pay the arrearages and stop the accruing of interest, and to make the future payments as they accrue and become due without interest, and relieve herself as well of the risk and burden of retaining the money, which of right belongs to the defendant. 4. The contract of insurance, where the policy is to be kept alive by periodical payments, is peculiar, and the duty to pay and the obligation to receive are mutual. It is somewhat different from a simple obligation to pay money, a tender to perform which would bar an action upon it. So, too, a receipt or acknowledgment of the payment is customarily given, and is as essential as evidence of the continuance of the contract as is the original policy. The policy-holder is entitled to some evidence of the performance of the condition on his part, if, as is believed, the universal usage is for the insurers to certify in some way the fact that the annual premiums are paid. 5. It is fit and proper that both parties to the contract should know their rights; especially is it important to the plaintiff and the insured that, if this policy is avoided, they may seek insurance elsewhere, and, if valid, that they may perform the conditions of the policy.

In ordinary cases courts will not, in advance of any present duty, obligation or default, declare the rights and obligations of suitors; they will do it where peculiar circumstances render it necessary to the preservation of right. It was done in *Baylies* v. *Payson* (5 Allen, 473). Courts of equity depart from the ordinary rules by which their jurisdiction is hedged in, in order to do equity between suitors; and whether a proper case is made for the exercise of the equitable powers of the court necessarily depends upon the circumstances.

Statement of case.

(See *Ball* v. *Coggs*, Brown's Parl. R., 296; *Bupton* v. *Lester*, 3 Atk., 383; 2 Story on Eq. Jur., § 826.)

Had the parties made a case containing precisely the facts alleged in the complaint for submission under section 372 of the Code, the court would not have hesitated to entertain jurisdiction and pass upon the merits of the controversy.

The court has jurisdiction, and the judgment must be reversed and judgment given for the plaintiff, with leave to defendant to answer.

CHURCH, Ch. J., PECKHAM and ANDREWS, JJ., concur. GROVER, FOLGER and RAPALLO, JJ., not voting.

Judgment accordingly.

STEPHANIA LUCY SANDS, Respondent, *v.* THE NEW YORK LIFE INSURANCE COMPANY, Appellant.

The rule of the law of nations which annuls contracts between the citizens of two States upon the breaking out of a war between the States, has no application to life insurance, unless the policy insures against death while the assured is in the military service of his country. It is only such commercial contracts made prior to the war as give aid and comfort to the enemy, or such as are forbidden by or are against the policy of the government, that are dissolved. It is the settled policy of government to impair, as little as possible, the private rights of citizens by national differences.

The payment of premiums upon a life policy, and the remedy in case the policy becomes due during the war, are simply suspended until peace is restored. No forfeiture will arise for the non-payment of the premiums during the war, provided they are promptly paid, with proper interest, on the return of peace. The condition in a policy of life insurance forfeiting the policy, in case of non-payment of premiums subsequently accruing thereon, is a condition subsequent, not precedent.*

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* This case is distinguishable from that of *Howell* v. *The Knickerbocker Life Ins. Co.* (44 N. Y., 276). There the policy was for one year, with a proviso that it might be continued from time to time until the decease of the assured, provided he should duly pay, or cause to be paid, the premium. It was there held that payment was a condition precedent, and unless performed the policy was no longer in force, although performance was prevented by act of God.

Statement of case.

Defendant had a general agent residing in Mobile at the time of the breaking out of the war of the rebellion; his authority to receive premiums was recognized by it after the issuing of the president's proclamation forbidding commercial intercourse. Plaintiff, who held a life policy issued by defendant upon the life of her husband, paid to such general agent, in Confederate currency, the premium thereon which fell due January 2d, 1862. *Held*, that this was a valid and effectual payment.

(Argued December 18, 1872; decided December 24, 1872.)

APPEAL from order of the General Term of the Supreme Court in the first judicial department, reversing judgment in favor of defendant entered upon the report of a referee and granting a new trial. (Reported below, 59 Barb., 556.)

This action was brought by the plaintiff as assignee of a policy of life insurance.

The defendant issued to James Sands, of Mobile, a life policy for $5,000 on his life, dated January 28, 1850, in which the annual premium was fixed at $160, payable on the 18th of January in each year.

The annual premiums were paid to James M. Muldon, the defendant's agent at Mobile, and were duly remitted by him to the defendant, down to and including that which became payable January 18, 1861.

On January 18, 1862, Sands paid to Muldon $160 in Confederate notes, which the latter accepted as cash, as and for the premium on said policy which fell due on that day.

Sands died on July 12, 1862; due proofs of death were furnished to the defendant August 11, 1866; they refused to pay the amount insured. The policy was duly assigned to the plaintiff before suit.

Under and by virtue of the act of congress of July 13, 1861, and the president's proclamation of August 16, 1861, all commercial intercourse was prohibited between the citizens of the United States and the inhabitants of the States in rebellion. Both Sands and Muldon resided in Alabama; the former was not in any way connected with the rebel army or engaged in active hostilities of any kind.

Defendant, by letter dated August 21, 1861, recognized the

authority of Muldon to receive premiums, and directed as to the disposition thereof. This authority was canceled some time after the receipt of the premium upon the policy in question.

The referee found that Sands and defendant became public enemies from and after August 16, 1861, and the further execution of the contract became and was unlawful, and no right accrued to plaintiff in consequence of the death of Sands. That by the war the authority of Muldon, as agent, was revoked, and the payment to him of the premium was not a payment to defendant, and ordered judgment for defendant, which was entered accordingly.

Noah Davis for the appellant. From August 16, 1861, plaintiff was a public enemy with whom all intercourse, commercial or otherwise, was unlawful. (*The Rapid*, 8 Cranch, 155; Wheaton's Law of Nations, 548; 1 Gallison, 295; *Prize Cases*, 2 Black, 673, 687; *Mrs. Alexander's Cotton*, 2 Wall., 419; *Billgery* v. *Branch*, 8 Am. Law Reg., No. 6, 334; *Woods* v. *Wilder*, 43 N. Y., 167, 168; *Bank of New Orleans* v. *Matthews*, Court of Appeals, March, 1872; *McStea* v. *Matthews*, Court of Appeals; *Robinson* v. *Mutual Ins. Co.*, 42 N. Y., 54; *Swinnerton* v. *Columbian Ins. Co.*, 37 id., 174; *In re William Bagaley*, 5 Wallace, 377; *Hanger* v. *Abbott*, 6 id., 535; *United States* v. *Grossmayer*, 9 id., 75.) War annuls and makes unlawful all insurances upon enemies' property. 1 Duer's M. Ins., 473; 1 Phill. Ins., § 223; *Furtado* v. *Rogers*, 3 Bos. & Pull., 191; *Gamba* v. *Le Mesurier*, 4 East, 407; *Brandon* v. *Curling*, id., 410; *Kellner* v. *Le Mesurier*, id., 396; *Oddin* v. *Penn. Ins. Co.*, 2 Wash. C. C. R., 321; *Gray* v. *Lewis*, 3 id., 280; *Leathers* v. *Com. Ins. Co.*, 2 Bush, 298; Bunyan on Life Insurance, Law Library, vol. 49, side page 19; *Flint* v. *Waters*, 15 East., 260; *Harman* v. *Kingston*, 3 Campbell, 153; *Potts* v. *Bell*, 8 Term Reports, 548; *Manhattan Life Ins. Co.* v. *Warwick*, 2 Bigelow, Lf. & Ac. R., 193.) The contract sued on was an executory contract, and its continued execution during the war

Statement of case.

would have been illegal. (1 Duer on Ins., 478; *Hanger* v. *Abbott*, 6 Wall., 532; *Greenfield* v. *Mass. Mut. Life Ins. Co.*, 47 N. Y., 436; 1 Bigelow L. & Ac. R., 199; *Roberts* v. *New England Mut. Life Ins. Co.*, id., 634; *Woods et al.* v. *Wilder et al.*, 43 N. Y., 167; Wheaton's Int. Law, § 317; 1 Kent Com., 67; Story on Cont., § 608; *White* v. *Bromley*, 2 How., 249; *Scholefield* v. *Eichelberger*, 7 Peters, 586; *United States* v. *Grossmayer*, 9 Wall., 75.) The war operated *per se* as a revocation of the authority of defendant's agent at Mobile. (*Hanger* v. *Abbott*, 6 Wall., 535; Story on Partnership, § 316; 5 Wall., 406; 2 Brush., 298; *Wood et al.* v. *Wilder et al.*, 43 N. Y., *supra*; Story on Agency, §§ 462, 481, 482, 499.) The payment of the annual premium was a condition precedent to any obligation on the part of defendant. (*Howell* v. *Knickerbocker Life Ins. Co.*, 44 N. Y., 276; *Oakley* v. *Morton*, 11 id., 25; *Catlin* v. *Tobias*, 26 id., 47; *Harmony* v. *Bingham*, 12 id., 99; *Tomkins* v. *Dudley*, 25 id., 272; *Holdipp* v. *Otway*, 2 Sand. R., 106; *Wood* v. *Nasby*, 6 Term R., 710; *Oldman* v. *Bewick and another*, 1 Henry Blackstone, 577, note; *Routledge* v. *Burrell*, 1 id., 254; *French* v. *Campbell*, 2 id., 178; *Scott* v. *Tyler*, 2 Bro. Ch. C., 455; *Popham* v. *Banfield*, 1 Vern., 83; *Bertrie* v. *Ld. Falkland*, 3 Ch. C., 129; 2 Vern., 333; *Wells* v. *Smith*, 2 Edw. Ch., 78; *Moore* v. *West. F. Ins. Co.*, 12 Wend., 452; *Owens* v. *Farmers' Joint Stock Co.*, 57 Barb., 518; 2 Dallas, 317; *Dermott* v. *Jones*, 2 Wall., 8; *Nightingale* v. *State Mut. Ins. Co.*, 5 R. I., 38; *Phillips* v. *Eastwood*, L. & G., 291; *Mutual Benefit Life Ins. Co.* v. *Ruse*, 1 Bigelow, 83; *Robert* v. *The New England Mut. Life Ins. Co.*, id., 634; 44 N. Y., 276; *Catoir* v. *Am. L. and T. Co.*, 4 Vroom, 487; *O'Reilly* v. *The Mut. Life Ins. Co. of New York*, Superior Court, November 22, 1868, per Chief Justice ROBERTSON; *Cohens* v. *The Mut. Life Ins. Co.*, same court, General Term, 1868; *Koelgis* v. *The Guardian Life Ins. Co.*, 2 Lansing, 480; *Taylor* v. *The British Commercial Life Ins. Co.*, which is referred to in the same case.)

G. De Forest Lord for the respondent. The payment of the premium in Confederate currency was a valid payment. (*Robinson* v. *International Life Ass. So.*, 42 N. Y., 54 [1870]; *Thorington* v. *Smith*, 8 Wall., 1 [1868]; *Pollglass* v. *Oliver*, 2 Cr. & J., 15 [1831]. A contract made prior to a war is a valid existing legal obligation when the war breaks out, where it does not involve inter-territorial intercourse, or lend aid or comfort to the enemy. (*Bell* v. *Chapman*, 10 John., 183; *Ex parte Bousmaker*, 13 Ves., 702.) This rule does not apply to a contract of insurance. (*Buchanan* v. *Curry*, 19 John., 137; *Ward* v. *Smith*, 7 Wall., 447 [1868]; *Manhattan Life Ins. Co.* v. *Warwick*, 20 Grattan, 614; *Hamilton* v. *Mut. Life Ins. Co.*, U. S. Circuit Court, southern district N. Y., January, 1872; 9 Blatchf., 234; *Ruse* v. *Mutual Benefit Life Ins. Co.*, 26 Barb., 556; *Furtado* v. *Rogers*, 3 Bos. & Pull., 193; *Kellner* v. *Le Mesurier*, 4 East, 396; *Gamba* v. *Mesurier*, id., 407; *Brandon* v. *Curling*, id., 410.) The courts are inclined to uphold pre-existing contracts, so far as can be done, without lending aid or comfort to active enemies, or without conflicting with recognized belligerent rights; and in no case *needlessly* to declare them void. (*Clarke* v. *Morey*, 10 Johns., 69; *Bell* v. *Chapman*, id., 183; *Brodwell* v. *Weeks*, 13 id., 1, opinion of YATES, J.; *Clopton* v. *New York Life Ins. Co.*, 7 Bush, 179; *Manhattan Life Ins. Co.* v. *Warwick*, 20 Gratt., 614; *Scholefield* v. *Eichelberger*, 7 Peters, 586.) The war did not revoke Muldon's agency. (*Denniston* v. *Imbrie*, 3 Wash. C. C., 403; *Ward* v. *Smith*, 7 Wall., 447; *Conn.* v. *Penn.*, 1 Pet. C. C. R., 524; *United States* v. *Grossmayer*, 9 Wall., 75; *Robinson* v. *International Life Ass. So.*, 42 N. Y., 62.)

PECKHAM, J. Action to recover the amount of a policy of insurance issued by defendant to the husband of the plaintiff on the 28th of January, 1850, then a resident of Mobile, in Alabama; whereby, in consideration of $160 then paid, and of the annual payment thereafter of a like sum during the continuance of the policy, the defendant agreed to insure him

in the sum of $5,000 "for the term of his natural life." Sands died at Mobile in July, 1862.

It is admitted that all premiums were paid on the policy up to January, 1862; and it is proved and found that the premium due in January, 1862, was paid to one Muldon, the agent of defendant, at Mobile, appointed prior to our civil war, and through whom this policy was issued; and it was paid in Confederate treasury notes, then, substantially, the only currency of the so-called Confederate States for the general business of those States; and, although not made a legal tender for the payment of debts, it was so used, and was then very generally received at par in payment of debts and for the purchase of property, although it was at a discount for gold of about twenty per cent. This currency was received by Muldon, the general agent of the defendant, as money.

The defendant now objects to the payment of the insurance upon various grounds. Its counsel insist that the war made the contract void; that the contract was executory, to be renewed each year by payment of the premium or it became void; and hence such contract became utterly void by the war; that it was void as requiring commercial intercourse between the States at war; that, at any rate, the agency of Muldon was avoided by the war. Hence, that he had no authority to receive payment of the premium in January, 1862; and certainly not in Confederate notes.

It is certainly true that all contracts with citizens of Confederate States are not made void by the war.

It is against sound principle, and at war with the lights of the age, that the debts of individuals should be impaired by national differences; debts, be it understood, that existed by virtue of contracts made prior to the war. (*Clarke* v. *Morey*, 10 J. R., 73.)

This contract of the parties I do not think was nullified by the war. What was it? As presented in the complaint and found by the referee, it is a contract of insurance by defendant for the life of the insured for the consideration of so much money received, and the annual payment of $160

during the continuance of the policy. It was a valid policy "for the life of the insured," to become void by the omission to pay the agreed annuity. In principle, I do not see why it is not like a lease or grant of land in fee, reserving rent, to become void if the rent be not paid, if the condition subsequent be not complied with. I do not say that it would bar the plaintiff's recovery if the contract were as the defendant insists it is. It is enough to say that such is not this contract. The agreement is to insure for the life of the assured. Subsequent failure to pay the annuity when due defeats the policy. It is a condition subsequent, not precedent.

Is this contract criminal or illegal, as contravening the policy of the government?

If it be, if it give aid and comfort to the enemy, it is nullified by the war.

It is insisted that it is void because it intends and implies commercial intercourse between citizens of hostile States; "locomotive" intercourse, as it is termed; and, if it does, it is annulled by the war. (*Woods* v. *Wilder*, 43 N. Y., 167; *Griswold* v. *Waddington*, 16 J. R., 438; *Clarke* v. *Morey*, 10 id., 69; *United States* v. *Grossmayer*, 9 Wallace, 75.)

Clearly it is not law, nor do these or any recognized authorities intend to hold that a valid debt by note, bond or contract, existing when the war began, against a citizen of a Confederate State in favor of a citizen of a northern State was nullified by the war. The debt is suspended until peace returns. It is not destroyed. (*Buchanan* v. *Curry*, 19 J. R., 137; *Bell* v. *Chapman*, 10 id., 183; *Clarke* v. *Morey*, id., 69; *Ex parte Boussmaker*, 13 Vesey, 702; *Semmes* v. *Hart. Ins. Co.*, 13 Wallace, 158; *Prize Cases*, 2 Black, 687, per NELSON, J.; *The Protector*, 9 Wal., 687; *United States* v. *Wiley*, 11 id., 508.)

Nor would it make the least difference as to the validity of the claim by contract that it was for the purchase of a farm of a citizen in a Confederate State, upon which contract large payments had been made and one or two yet remained unpaid, even though it were expressly stipulated that if the

after payments were not made when due the contract should be void, and the purchaser should forfeit, as liquidated damages, all payments theretofore made thereon.

The war would suspend such a contract until peace. (*Semmes* v. *Hart. Fire Ins. Co.*, *supra*, and other cases.)

There is no principle upon which war could annul it. This is so, irrespective of the question of real or personal estate involved. Such a contract affords no aid or comfort to the enemy.

It requires no "locomotive" intercourse, unless such intercourse be required by a bond or note past due.

The principle involved in such a contract would be the same if it contained no provision as to its becoming void, but only provided for the execution of a deed upon the payments being made as therein provided.

Yet such a contract would be nullified by the war, according to some text-books and by the *dicta* of some judges. The payments not being all made when the war commenced, there was no vested right to a deed. Some acts, therefore, remained to be done "by or between the parties during the war." Hence, they say it was abrogated by the war. One writer says it is "probably" void "as to all acts to be performed during the war." (1 Duer on Ins., 478.) This was assuming to lay down a general rule after discussing *Griswold* v. *Waddington* (16 J. R, 438). Some *dicta* of judges say that all *contracts* are "annulled by the war."

Authorities sustain neither position. It is really of no moment whatever whether these payments were optional with or obligatory upon the assured, as to this question. The payments were all to be made by virtue of and under a contract made before the war. Such a contract could not be nullified by the war, unless it was hostile to the policy of the government, at war with its interests; *dicta* of judges should always be construed with reference to the case then before the court.

The general rule undoubtedly is, that it is only commercial contracts, such as give aid and comfort to the enemy, or are forbidden by or are against the policy of the government, that

are void as to all acts to be done during the war, though the contracts were made before the war.

Contracts for the insurance of the enemy's property, of affreightment and of commercial copartnership, are avoided thereafter by the breaking out of the war, because they are inconsistent with the war, inconsistent with the interests and policy of government, whose purpose is, by the war, to destroy and cripple the enemy's property and commerce. (*Furtado* v. *Rodgers*, 3 Bos. & Pul., 191; *Killner* v. *Le Mesurier*, 4 East, 395, and the two cases following; *Kershaw* v. *Kelsey*, 100 Mass., 561.)

This last case, in an able review of the authorities, holds a lease made by a citizen of Massachusetts in a southern State, entered into there after the war began, to be valid, and that the lessee was liable for the unpaid rent. (*Clarke* v. *Morey*, *supra*.)

The rule that makes such contracts as before alluded to void, has no application to life insurance.

This contemplates no commercial intercourse, no aid to the enemy's commerce, no aid or comfort to the enemy, no violation of governmental policy. It is idle to say that it fosters or implies commercial intercourse.

That money falls due annually to the defendant for the premiums, during the war, does not make the contract void any more than would installments of debt falling due upon a bond or note, given before the war, render the bond or note void. That is not commerce or commercial intercourse.

The law does not presume that an honest debt due to an alien enemy will be paid over to him during the war, even though paid to his resident agent. (*Buchanan* v. *Curry*, 19 J. R., 137; *Denniston* v. *Imbrie*, 3 Wash. C. C., 403; *Ward* v. *Smith*, 7 Wall., 447.)

Nor is it made void by the fact that the policy itself might become payable during the war. It would be no more void for that reason than if a note or bond given before the war should so fall due. The right to receive or collect it by the

representatives of the assured is suspended until peace is restored.

Why is not the note or the bond given before the war made void by the war? Simply because the interests of government do not require it. Their validity is not hostile to the government. Because it is the settled policy of government to impair, as little as possible, the private rights of citizens by national differences. (*Clarke* v. *Morey*, 10 J. R., 69; *Bradwell* v. *Weeks*, 3 J. R., 1; 7 Peters, 586.) That this contract of insurance cannot possibly operate in hostility to the government or its policy in the war, I think is entirely plain.

If it insured the enemy against death in the enemy's army, it would of course be void; because then, although it gave to the assured no benefit to himself, yet it gave it to his family by his death. But it insured against no such loss. An exception against such a loss would be implied in the contract as being illegal, but it is plainly expressed here. The policy provides: "If he should enter into any military or naval service whatever, or if he should die in the known violation of any law of the United States, the said policy shall be null and void."

It is insisted that men, as well money, are necessary to the war. True; but this insurance is a direct reward to keep men out of the war. If they go in, the policy is instantly void. It may be regarded, therefore, so far as it operates at all, as a direct premium to prevent the filling up of the enemy's army. Again, it is not the purpose or policy of government to destroy mere non-combatants in the enemy's country—civilians, not belonging to the army. It is the rule of all civilized warfare to protect such persons—to shield them from injury. Then why should this insurance be condemned, as to its ultimate object?

Again, it would not be claimed that an annuity purchased from an enemy before the war, and paid for, was made void by the war, though payable any number of times during the year. Yet the difference in principle is not apparent between that and the case at bar. The only difference in form is,

that there the annuitant paid in full for the annuity, and receives back his annuity in installments. Here he pays by annual installments, and receives it back in gross by his representatives.

If it be unlawful to pay the annuity during the war, by inter-territorial intercourse, then it must not be paid in that way. But there is no pretence of avoiding such an annuity by the war, because it might, by possibility, like any other debt, be improperly paid. (See *Buchanan* v. *Curry*, and other cases, *supra*.) Well considered cases hold that payment of these annual installments is not like the cases made void by war of affreightment and commercial copartnership, it being a single act, or an annual act, instead of a continued business. (*Clopton* v. *N. Y. L. Ins. Co.*, 7 Bush. [Ky.], 199; *Hamilton* v. *Mut. L. Ins. Co.*, by Justice BLATCHFORD, in southern district; *Manhattan L. Ins. Co.* v. *Warwick*, 20 Grat., 614.) This is reasonable. But the stronger ground, in my opinion, is, that the contract having been made before the war, and it being of the character before described, its fulfillment afterward is not against the purpose or policy of the war. Cases of marine insurance, of insurance against capture by the enemy on the sea, and contracts of affreightment have no analogy to this. This contract therefore was neither illegal nor criminal.

It is urged that the last premium was not paid, and hence the policy became void. If it were not paid I do not think the consequences claimed would follow. The war suspended this contract, and no forfeiture for non-payment would arise while the war lasted, provided the premiums, with proper interest, were promptly paid on the return of peace.

It is clear that this state of things was a surprise to both parties—they made no provision for a war. If they had, it is equally clear that they would never have provided for such an inequitable result as the defendant now claims.

It is argued that these payments, at the time required, are a condition precedent to the right to the insurance, which nothing can excuse—not even an act of Providence can dis-

pense with. Without stopping to question this position, it is clear that war in this respect, then, can accomplish what cannot be done otherwise. War extends the statute of limitations (*The Protector*, 9 Wall., 617; *Hanger* v. *Abbott*, 6 id., 532) not only against citizens, but against the United States. (*U. S.* v. *Wiley*, 11 Wall., 508.)

It is equally a condition precedent to a right to recover on a policy, that the action shall be brought within the time specified in the policy. The parties have an undoubted right, by contract, to fix a short statute of limitations, obligatory in the given case. Yet war annuls that limitation, if necessary, and the action may be brought wholly irrespective of that provision of the policy. So held in *Semmes* v. *Hart. Ins. Co.* (13 Wall., 158), where that was the sole point of the case. If such be its effect upon that provision, there is no reason why it shall not save from forfeiture this condition of payment of the premium when due. It is the fault of neither party that it is not paid, and war suspends contracts like this, but does not destroy them.

Nor is there any injustice to the defendant. Of course there is none in the present case, where the assured had confessedly paid for twelve years and died in six months thereafter; in fact, had paid the last premium. But justice is generally done by requiring the payments promptly after the war ceases, with proper interest. The companies do no more than invest their money upon interest. If some fail thus to pay, of course they lose all they have paid, which cannot injure the company.

Symptoms of war are usually quite plainly visible before it comes, and insurers may observe and cease to insure, so that generally a reasonable advance in premiums is made by the assured before the war comes. Cases may possibly occur where the company might lose by the failure to pay by the assured when peace is restored. In ordinary business they would be rare. But the great injustice would be generally to the assured by this forfeiture. It is sought to compare it to a commercial copartnership, to which it has no analogy.

But even such a partnership is avoided only as to the future. Past transactions and liabilities are valid. But here, if this contract be made void, all past transactions are made void. The assured would lose all his payments upon the grounds claimed by the defence. But no such question arises here as the premium was paid.

The defendant had a general agent in Mobile when the payment was made, as it lawfully might, to receive the demands due the company. That it had an agent, in fact, in January, 1862, when the premium was paid, is proved and found by the referee. His continuance after the president's proclamation was expressly recognized by the defendant by letter of the 21st August, 1861. That he was lawfully defendant's agent is settled. (See cases before cited; *Buchanan* v. *Curry*, 19 J. R., 137, where the point was involved; *Denniston* v. *Imbrie*, 3 Wash. C. C., 403; *Ward* v. *Smith*, 7 Wall., 447; *Conn.* v. *Penn.*, 1 Pet. C. C., 524; *United States* v. *Grossmayer*, 9 Wall., 72; *Robinson* v. *Inter. Life Ins. Co.*, 42 N. Y., 54; *Kershaw* v. *Kelsey*, 100 Mass., 561.)

It is urged, as a ground of injustice to defendant, that if the money were paid to defendant's agent at Mobile, it might and would be confiscated to the enemy's government. True, so might any debt due from an alien enemy, but that reason would not invalidate the debt. That the payment in Confederate notes was a valid payment is decided. (*Robinson* v. *Inter. Life Ins. Co.*, *supra*; *Polglass* v. *Oliver*, 2 Cromp. & Jer., 151.) That a contract like this was not avoided by the war is adjudged in principle in the cases cited of *Buchanan* v. *Curry* (19 J. R., 137), which has never been overruled. And the following authorities are in point, to sustain this action: *Clopton* v. *N. Y. Life Ins. Co.* (7 Bush. [Ky.], 179); *Hamilton* v. *M. L. Ins. Co.* (9 Blatch., 234); *Manhattan Life Ins. Co.* v. *Warwick* (20 Gratt., 626). And I am not aware of any case to the contrary.

Statement of case.

The order should be affirmed and judgment absolute rendered against defendant.

All concur except GROVER, J., not voting, and RAPALLO, J., not sitting.

Judgment accordingly.

LEWIS BROOKS, Appellant, *v.* JOSEPH CURTIS et al., Respondents.

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Adjoining proprietors have each an easement in the land of the other covered by a party wall, and the title of each owner is qualified by the easement to which the other is entitled. This easement includes the right to increase the height of the wall, provided such increase can be made without detriment to the strength of the wall, or to the property of the adjacent owner. The party making the addition, however, does it at his peril; he must insure the safety of the work, and if injury results he is liable.

On appeal from a judgment dismissing complaint in an equity action, with costs, the General Term modified the judgment by granting a portion of the relief prayed for, and affirmed it as thus modified. *Held*, that the General Term, in making their decision, necessarily held that the Special Term should not have dismissed the complaint, but should have granted that portion of the relief sought embraced in the modification, and that the form of the judgment was technically erroneous; but that the error was one of form merely, except as the question of costs was concerned; and as costs were in the discretion of the court below, this court would not disturb the judgment upon that ground.

(Argued December 9, 1872; decided January 21, 1873.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, modifying judgment in favor of defendants, entered upon the decision of the court at Special Term, and affirming judgment as modified.

This action was brought to compel defendants to remove certain encroachments alleged to have been placed by defendants upon the premises of plaintiff, and to restore the property to its former condition.

Statement of case.

The parties are the owners of adjoining premises, situate in the city of Rochester. In 1846 one Everard Peck owned both premises. He deeded to plaintiff, in July of that year. At that time Peck had begun the construction of a three-story brick building upon the lot. The easterly line of the premises conveyed to plaintiff is thus given in the deed: "Beginning at a point on the north of Buffalo street * *

* opposite the center of the brick wall which said party of the first part is now erecting as the west wall of a block of stores; thence northwardly through the center of said brick wall seventy-nine feet." In 1855, plaintiff erected a three-story building, using the wall as the east wall thereof. In 1856 the defendants acquired title from the executors of Peck to the balance of the lot. In 1866, they added two additional stories to their building—building up the party wall for that purpose. They also lowered the ceiling of the upper story of the building, as it was, some six feet, letting the joists into the old wall, and, to secure them, passed iron anchors through the wall, fastened on the west face of the wall by nuts and plates. The anchors were inserted with the verbal consent of plaintiff. The latter gave no consent to raising the wall. After the addition was completed, ice and snow from the roof of defendants' building fell upon plaintiff's roof, doing some damage.

The court directed the dismissal of the complaint, and judgment was entered accordingly.

The judgment of the General Term was as follows: "Judgment modified so as to restrain the defendants from maintaining their roof in such manner and of such construction that the water and snow from it, and the ice formed from the waters falling from it, descend upon the roof of the plaintiff's adjoining building. As thus modified, judgment affirmed, without costs of this appeal to either party."

James C. Cochrane for the appellant. Plaintiff's title was absolute, without any charge upon the same. (1 R. S., 748, § 1; *Nicholl* v. *N. Y. & Erie R. R. Co.*, 12 N. Y., 128;

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Burr v. *Mills*, 21 Wend., 290; *Clark* v. *Baird*, 9 N. Y., 183; *Drew* v. *Swift*, 46 id., 204.) The use of the wall by Peck was without any claim of right, and under a license revocable at any time. (2 Wash. on Real Property, §§ 30, 48; *Eno* v. *Del Vecchio*, 4 Duer, 53.) In party walls there exists a mutual easement for their support, nothing more. (*Hendricks* v. *Stark*, 37 N. Y., 110; *Matt* v. *Hawkins*, 5 Taunt., 20; *Partridge* v. *Gilbert*, 15 N. Y., 608, 614, 615.) Defendants knew they were building on plaintiff's property, and they must abide the consequences. (*Babcock* v. *Allen*, 32 How., 439, in Court of Appeals; *Vosburgh* v. *Seaton*, 32 N. Y., 565; *Jacobs* v. *Morange*, 47 id., 57.) The court erred in nonsuiting the plaintiff. (*Scofield* v. *Hernandez*, 47 N. Y., 313.)

W. F. Cogswell for the respondents. The wall between the buildings of the parties was a party or common wall, in which each party had a common interest. (Washburn on Easements, 542; *Partridge* v. *Gilbert*, 15 N. Y., 601; 3 Kent's Com., 438.) Defendants, as owners in common with plaintiff, had a right to carry up the wall, and to insert the stays necessary for their building. (Washburn on Easements, 537, 548; *Watts* v. *Hawkins*, 5 Taunt., 20; *Eno* v. *Del Vecchio*, 4 Duer, 53; 6 id., 17; *Sherred* v. *Cisco*, 4 Sandf., 480; *Price* v. *McConnell*, 27 Illinois Rep., 255; *Partridge* v. *Gilbert*, 15 N. Y., 601; *Campbell* v. *Messier*, 4 Johns. Ch., 334, and especially at the foot of page 339 *et passim*.) Plaintiff having allowed defendants to carry up and change their structure, is estopped from denying their right to do so. (Washburn on Easements, 90, 388, 389, 2d ed.; 63, 351, 1st ed.; *Wickersham* v. *Orr*, 9 Iowa, 260; 2 Eq. Ab., 522; Angell on Water-courses, §§ 418–429; Herman on Estoppels, 427.) A parol license to enter upon lands of the licensor, and make substantial erections for the benefit of the licensee, at his expense, is, in a court of equity, valid. (*Babcock* v. *Utter*, 1 Keyes' Rep., 397; *Mumford* v. *Whitney*, 15 Wend., 380; Washburn on Real Property, 3d ed., vol. 1, pp. 542, 551,

being book 1, chap. 12, § 2, title "License;" *Miller* v. *Platt*, 5 Duer, 272; *Lobdell* v. *Lobdell*, 36 N. Y., 327; *Whitmarsh* v. *Walker*, 1 Metc., 316; *Wood* v. *Leadbieter*, 13 M. & W., 838; *Wetmore* v. *White*, 2 Caines' Cases in Error, 87; *Pierrepont* v. *Barnard*, 2 Seld., 279; *Wood* v. *Lake*, Sayre, 3; *Winter* v. *Brockwell*, 8 East, 308; *Taylor* v. *Waters*, 7 Taunt., 374.)

RAPALLO, J. The deed from Everard Peck to the plaintiff states that the wall in controversy was, at the time of the conveyance, being erected by Peck as the west wall of a block of stores. The center line of the wall is, by the deed, made the easterly boundary of the land conveyed, which includes the land on which the westerly half of the wall stands. It appears that Peck's stores were afterward completed, and the plaintiff erected a building upon his own lot, using the wall as a party wall, and inserting in it the joists of his building. Peck afterward conveyed to the defendant, who made the addition to the height of the wall.

We think that the language of the deed and the acts of the parties show that it was their intention that the wall should be a party wall for the common use of both lots. The deed states that Peck was at the time erecting the wall, half of which was conveyed, and that it was to be the west wall of his block. This implies that the wall was not then completed, and that Peck was to have the right to complete it and use it as the west wall of his block. If the deed is to be treated as an absolute conveyance, free from any reservation, easement or privilege in the co-owner of the wall, Peck would have had no right to proceed to complete it, or, at least, that part which was beyond his line, after the conveyance. It cannot be supposed that such was the intention of the parties. Subsequently to this conveyance the wall has been used for more than twenty years as a party wall.

Although land covered by a party wall remains the several property of the owner of each half, yet the title of each owner is qualified by the easement to which the other is

entitled; and an important question in this case is whether such easement includes the right to increase the height of the wall, provided such increase can be made without detriment to the strength of the wall or to the property of the adjacent owner.

This question, in the absence of statutory regulations upon the subject, does not seem to have been distinctly settled by authority; but the fact appears in several of the cases relating to party walls that the height had been increased, and there is no intimation that such increase was unlawful. *Watt* v. *Hawkins* (5 Taunton, 20) was an action of trespass. The plaintiff had added to the height of a party wall, and the defendant tore down the addition, for which injury the plaintiff brought trespass. The only point decided was that the parties were not tenants in common of the land, and therefore the action of trespass could be maintained. In *Campbell* v. *Mesier* (4 Johns. Ch., 334) a party wall, standing equally on two lots, having become ruinous, the owner on one side, against the will and in spite of the prohibition of the adjacent owner, pulled down the wall and rebuilt it higher than it was originally. It was held that the adjacent owner was bound to contribute to the expense of the new wall, but not to the extra expense of making it higher than the old. There is no intimation in the case that the increase of height was wrongful. In *Partridge* v. *Gilbert* (15 N. Y., 601) the new wall built by the defendant was not only higher, but its foundations were deeper than the old wall which it replaced. The right to make these additions was not, however, discussed in the case, and perhaps there was no occasion to discuss it; the action being brought by the tenant of the adjacent lot, whose goods were injured in making the repair, and not by the owner.

In *Eno* v. *Del Vecchio* (4 Duer, 53) it was held that the owner on one side of a party wall might, for the purpose of improving his own premises, underpin the foundation of the wall and sink it deeper if he could do so without injury to the building on the adjoining lot; also, that he might

increase, *within the limits of his own lot*, the thickness, length or *height* of the wall, if he could do so without injury to the building on the adjoining lot.) Whether he could raise the whole party wall higher or whether any additional elevation must be wholly within the limits of his own lot, the court expressly declined to decide.

(We think that the right of either of the adjacent owners to increase the height of a party wall, when it can be done without injury to the adjoining building, and the wall is clearly of sufficient strength to safely bear the addition, is necessarily included in the easement.) No adjudication adverse to that right has been referred to by counsel or found by us. The party making the addition does it at his peril; and if injury results he is liable for all damages. He must insure the safety of the operation. But when safe it should be allowed. The wall is devoted to the purpose of being used for the common benefit of both tenements. In *Hendricks* v. *Stark* (37 N. Y., 106) it is held that a party wall is in no sense a legal encumbrance upon either property; that the mutual easements of adjoining proprietors in such walls are a mutual benefit to each, and not a burden, but a valuable appurtenant which passes with the title to the property. This is undoubtedly correct, provided each party is allowed to derive from the wall all the benefit which it is capable of affording without detriment to the other. But if, though of sufficient strength, it cannot be used by either party in increasing the height of his building, it may prove a serious injury to the property of one desiring to make that improvement; an improvement which is very usual and often very necessary in crowded cities. (The fairer view, and the one generally adopted in legislative provisions on the subject in this and other countries, is to treat a party wall as a structure for the common benefit and convenience of both of the tenements which it separates, and to permit either party to make any use of it which he may require, either by deepening the foundation or increasing the height, so far as it can be done without injury to the other.) The party making the

change, when not required for purposes of repair, is absolutely responsible for any damage which it occasions (*Eno* v. *Del Vecchio*, 6 Duer, 17); but in so far as he can use the wall in the improvement of his own property, without injury to the wall or the adjoining property, there is no good reason why he should not be permitted to do so.

The judge has found that the wall was sufficiently strong to be of the increased height without any injury thereto. He has further found that the carrying up of the wall, under claim of right, was with the knowledge of and without objection from the plaintiff; and that the anchors were inserted with his verbal assent. We think the judge was right in his conclusion of law, that the plaintiff was not entitled to relief, so far as the carrying up of the wall and insertion of the anchors were concerned.

The court at General Term, however, modified the judgment in respect to the roof, so as to restrain the defendants from maintaining it of such construction as to cause water, snow and ice to fall upon the roof of plaintiff's building. This modification is not appealed from. In making it, the General Term necessarily held that the Special Term should not have dismissed the complaint, but should have granted that part of the relief prayed for which is embraced in the modification, and should have denied the residue; and it is claimed that the judgment of the General Term is erroneous in affirming the dismissal of the complaint with the modification referred to. The appellant is technically correct in this claim. The more proper form would have been simply to modify the judgment, and render such judgment as the Special Term should have rendered. But the objection is one of form merely, except so far as the question of the costs awarded at Special Term is concerned. This being an equitable action, costs were in the discretion of the court below; and it had power, either at Special or General Term, to decree costs in favor of the defendants, although some part of the relief prayed

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for was granted. We will not, therefore, disturb the judgment on that ground.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

PATRICK ROGERS, Appellant, *v.* HARRIET SINSHEIMER, Respondent.

S., owning two adjoining lots, erected a house on each, with a party wall between them. He conveyed one lot to plaintiff's and one to defendant's grantor, by deeds recorded the same day. The description in the former deed conveyed the party wall and two inches beyond. Plaintiff brought action to recover possession of the strip from the centre of the party wall to the boundary line. *Held*, that plaintiff's premises were charged with a servitude of having the wall stand as an exterior wall to defendant's house and as a support to its beams so long at least as the buildings should endure; that the right to use the party wall necessarily carried with it the right to occupy the two-inch space with the timbers which were to find support in the wall, and to have the buildings and wall remain as they were at the time of the conveyances from S., while they endure; that actual possession, therefore, could not be given to plaintiff.

As to whether an action of ejectment would lie in such case, *quære*. At least all plaintiff could recover would be the fee, subject to the easement.

(Argued December 11, 1872; decided January 21, 1873.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, reversing judgment in favor of plaintiff entered upon the report of a referee, and granting a new trial.

This action was brought to recover possession of a strip of land in the city of Brooklyn, six inches wide.

About nineteen years before the commencement of this action J. S. T. Stranahan was the owner of two adjoining lots of land in said city, and built thereon two houses, separated by an eight-inch party wall. He conveyed the easterly lot to Hiram

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Travis and the westerly one to Nathaniel Travis. The deeds were recorded at the same time. The description in the deeds gave courses and distances. No reference was made to the party wall. There was a controversy as to the starting point in the deeds; but, assuming it to be as was claimed by plaintiff (which claim was substantially admitted upon the trial), the deed to Hiram Travis carried his title two inches west of the party wall. Plaintiff acquired title through several *mesne* conveyances to the lot deeded to Hiram Travis, and defendant was the owner and in possession of the westerly lot as grantee of Nathaniel Travis.

A. Dickinson for the appellant. Defendant cannot claim title adverse to plaintiff under her deed, for it does not include the premises. (5 Denio, 426; 9 Wend., 517; 13 Barb., 147; 14 id., 450; 33 id., 277; 53 id., 247.) No easement is established. (*Butterworth* v. *Crawford*, 46 N. Y., 349.)

Ira D. Warren for the respondent. Plaintiff's premises are charged with the servitude of having the wall stand as an exterior wall to defendant's house as long as the buildings endure. (Washburne on Easements and Servitudes, 2 ed., 76, 78–80; *Lampman* v. *Milks*, 21 N. Y., 513, 514; *Huttemeier* v. *Albro*, 18 id., 48; *Eno* v. *Del Vecchio*, 4 Duer, 53; *Partridge* v. *Gilbert*, 15 N. Y., 601; *Lasala* v. *Holbrook*, 4 Paige, 169; *Thayer* v. *Payne*, 2 Cush., 327; *Underwood* v. *Carney*, 1 id., 85; *Hendrick* v. *Starks*, 37 N. Y., 106; *Kilgour* v. *Ashcom*, 5 Harr. & J., 62; *Seymour* v. *Lewis*, 13 N. J., 439; *Eilhoff* v. *Sallee*, 14 Ohio, 10; *Jackson* v. *Gardner*, 8 John., 394; *Jackson* v. *Van Corlear*, 11 id., 123; *Fettrech* v. *Leamy*, 9 Bosw., 510; 2 Wash. on Real Estate, 1 ed., 78; *Laverty* v. *Moore*, 33 N. Y., 658; *Keteltas* v. *Penford*, 4 E. D. Smith, 122.) Courses and distances must give way to natural or ascertained objects or bounds called for by a grant. (*Wardell* v. *Jackson*, 8 Wend., 183; *Jackson* v. *Ives*, 9 Cow., 661; *Smith* v. *McAllister*, 14 Barb., 434; *Jackson* v. *Camp*, 1 Cow., 605.)

Opinion of the Court, per RAPALLO, J.

RAPALLO, J. From the facts found and admitted it appears that the two houses and lots, now owned by the parties to this action respectively, were originally owned by one Stranahan. He had erected the two houses thereon, and made the wall in question a party wall, between them. By two deeds, both dated and recorded at the same time, he conveyed the easterly lot to the grantor of the plaintiff, and the westerly lot to the grantor of the defendant, by a description which is claimed by the plaintiff to have so located the line of division as to throw the whole of the wall, and two inches of land on the westerly side thereof, within the boundaries of the plaintiff's lot.

Assuming that the plaintiff is right in his construction of the description, yet the wall being a party wall, and, at the time of the conveyance, serving as a support for the beams of the house erected on the lot now of the defendant, the premises now owned by the plaintiff were charged with the servitude of having the beams of that house supported by the wall in question, and of having the wall stand and serve as an exterior wall for the defendant's house, so long, at least, as the buildings should endure.

This servitude was both continuous and apparent; being one which would be discovered on an inspection of the premises by one reasonably familiar with the subject. (*Butterworth* v. *Crawford*, 46 N. Y., 349.) A mere measurement of the house would have disclosed it. Consequently, on the severance of the two properties, the grantee of the westerly lot acquired an easement corresponding with the servitude to which the easterly lot was subject. (*Lampman* v. *Milks*, 21 N. Y., 505, 509, 513; *Kilgour* v. *Ashcom*, 5 Harr. & Johns., 82.) The right to use the wall as a party wall necessarily carried with it the right to occupy the space of two inches intervening between the wall and the easterly boundary of the defendant's lot with the timbers which were to find support in the wall, and to have the building and wall remain as they were at the time of the conveyance from Stranahan, at least so long as the building and wall should endure.

Opinion of the Court, per RAPALLO, J.

The title of the plaintiff to the strip in controversy, if he has one, is therefore subject to this easement, and a judgment awarding to him the unqualified possession of the land was erroneous. Actual possession could not be given to the plaintiff without interfering with the defendant's easement. The conclusion of law of the referee was, that the plaintiff recover possession of the land described in his complaint, and judgment was entered accordingly. That judgment would have entitled the plaintiff to the ordinary writ of possession, and justified the removal of the wall, and so much of the defendant's house as stood on the east side of her true line.

The General Term was clearly correct in reversing that judgment. It is very doubtful whether an action of ejectment lies in this case; the land being subject to an easement, inconsistent with actual possession being taken by the plaintiff. *Brondage* v. *Warner* (2 Hill, 145) is an authority against such an action. (*Bradbury* v. *Coney*, 59 Maine, 494.) *Blake* v. *Ham* (53 id., 430) and authorities cited seem to sustain the action. But, at all events, the only interest the plaintiff could recover would be the fee subject to the easement; and the nature and extent of his interest must be specified in the verdict or finding. (2 R. S., 303, §§ 2, 3; id., 307, § 30; *Goodtitle* v. *Alker*, 1 Burr., 133.)

Without deciding that, in any case, a plaintiff, not entitled to actual possession, can maintain ejectment, we hold that in this case the plaintiff was not entitled to the absolute judgment for possession which was rendered on the report of the referee, and that such judgment was properly reversed at General Term. If the plaintiff desired to test his right to recover a qualified possession of or interest in the land, he should have gone to a new trial.

The order of the General Term must be reversed, and judgment absolute entered against the plaintiff on his stipulation, with costs.

All concur.

Judgment accordingly

MEMORANDA

OF

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS VOLUME, AND NOT REPORTED IN FULL.

THE EAST NEW YORK AND JAMAICA RAILROAD COMPANY, Respondent, *v.* JAMES H. ELMORE, Appellant.

(Argued May 30, 1872; decided June 20, 1872.)

Samuel Hand for the appellant.

John E. Parsons for the respondent.

Agree to affirm. No opinion.
Judgment affirmed.

MARY C. MAITLAND, Executrix, etc., et al., Appellants, *v.* AMELIA M. WHITLOCK, Respondent.

(Argued June 10, 1872; decided June 20, 1872.)

Ashbel Green for the appellants.

G. M. Speir for the respondent.

Agree to affirm. No opinion.
Judgment affirmed.

JOHN D. LOCKE, Respondent, *v.* WILLIAM B. BORROWS. Appellant.

(Argued June 10, 1872; decided June 20, 1872.)

William D. Booth for the appellant.

Benjamin W. Downing for the respondent.

Agree to affirm. No opinion.
Judgment affirmed.

MARY MCDONALD, Respondent, *v.* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF ALBANY, Appellants.

THOMAS RHATIGAN, Respondent, *v.* THE SAME, Appellants.

MARY CULLEN, Respondent, *v.* THE SAME, Appellants.

ANDREW KEAN, Respondent, *v.* THE SAME, Appellants.

JAMES JUDGE, Respondent, *v.* THE SAME, Appellants.

BARTHOLOMEW HANNAN, Respondent, *v.* THE SAME, Appellants.

JOHN LYSATT, Respondent, *v.* THE SAME, Appellants.

NELSON W. CHAMBERLAIN, Respondent, *v.* THE SAME, Appellants.

BRIDGET WELCH, Respondent, *v.* THE SAME, Appellants.

PATRICK A. WHITE, Respondent, *v.* THE SAME, Appellants.

MICHAEL NOLAN, Respondent, *v.* THE SAME, Appellants.

MICHAEL MCGRAIN, Respondent, *v.* THE SAME, Appellants.

THOMAS O'HARA, Respondent, *v.* THE SAME, Appellants.

THOMAS TIERNAN, Respondent, *v.* THE SAME, Appellants.

JOHN FLANIGAN, Respondent, *v.* THE SAME, Appellants.

[These fifteen causes were argued and decided together.]

(Argued June 10, 1872; decided June 20, 1872.)

Samuel Hand for the appellants.

Amasa J. Parker for the respondents.

All concur for affirmance. No opinion.
Judgment affirmed.

THE NIAGARA ELEVATING COMPANY, Respondent, *v.* DENNIS McNAMARA, Appellant.

(Argued June 3, 1872; decided June 20, 1872.)

THIS action was for the recovery of possession of 7,000 bushels of barley malt, levied upon and taken by defendant as collector of unpaid taxes for one of the wards of the city of Buffalo, by virtue of a warrant issued to him as such by the comptroller of said city. The warrant was in the proper form. Attached to it was a transcript from the first and second parts of the city tax roll. In the column headed "persons' names" appeared "Niagara Elevating Company," in the next column headed "valuation of personal property," opposite this name was "$250,000," and opposite this in the column headed "tax" was "$5,182.00." The levy was made to collect the sum last named. Plaintiff claimed that the assessment, in the manner and form it appeared upon the roll, was void; that the plaintiff, being a corporation, should have been assessed upon its capital stock in the manner and form prescribed by the statute. By the second section of title 5 of the charter of the city of Buffalo the board of assessors are directed to prepare an annual assessment roll of each ward in the city, and to proceed as near as may be in the manner required by town assessors, except as thereby provided. By the third section each assessment roll for each ward is to consist of two parts. The first is to contain the assessment of the taxable land in the ward and the second is to contain "the assessment of the taxable personal property and corporate capital of the ward" (Sess. Laws of 1853, chap. 230, title 5, § 3, p. 473); in which shall be arranged in alphabetical order

the names of the inhabitants of the ward deemed taxable, and of all corporations, etc., deemed liable to taxation in the ward. In 1859 there was an amendment to the charter (chap. 388, Laws of 1859), which provided that incorporated companies located in that city should be taxable under and according to the provisions of chap. 456 of 1857 (§ 1), and that the assessment rolls should be made out in accordance with the provisions of that act (§ 2).

Held, that the purpose of the act of 1859 was not to affect the form of the roll, but to direct the method of arriving at the real value of the capital stock as distinguished from its nominal value, and that the provision in the act of 1859 directing the rolls to be made out according to the act of 1857 was not intended to direct as to form, but as to the process to reach the desired result, and that therefore the provisions of the charter, as far as form is concerned, are not affected by the acts of 1857 and 1859; that the provisions of section 2 of the charter did not make the provisions of the Revised Statutes as to the form of making up the roll obligatory upon the city assessors, inasmuch as that was "otherwise provided" by section 3; that the fact that the roll did not show in express terms that the $250,000 was a valuation of the capital stock of plaintiff, but that the same was placed in a column headed "valuation of personal property" was not such an indication to defendant of erroneous action upon the part of the assessors as made the warrant void; he had the right to suppose the valuation was of the capital stock classed under its generic name of personal property; and that the warrant and roll did not apprise him of any lack of jurisdiction or of any vital error on the part of the board of assessors, and therefore protected him in making the levy.

George B. Hibbard and *D. F. Day* for the appellant.

John Ganson for the respondent.

FOLGER, J., reads opinion for reversal and new trial.
All concur.
Judgment reversed and new trial granted.

EMILY COOK, Appellant, *v.* ISAAC BANKER et al., Respondents.

A specific equitable lien upon lands will not be preferred to a prior lien by judgment thereon, and this is so, although the lands are acquired by the debtor after the recovery of the judgment. Nor does the fact that the foundation of the equitable lien is moneys used to improve and save the property, entitle it to priority.

The expenditure of the money of one upon the lands of another, or in which that other has a prior interest, if it be without the request or sanction of the latter, express or implied, creates no legal or equitable right that will override his estate or interest.

(Argued June 11, 1872; decided June 20, 1872.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, reversing a judgment entered upon the decision of the court at Special Term.

In the year 1863 defendants, Banker and Reeve, recovered judgment against defendant, Kraft. On the 1st of May, 1867, Kraft leased certain premises for the term of nineteen years. He erected a building thereon, borrowing the money for that purpose and executing mortgages upon his interest as security for the loans. Plaintiff purchased and took an assignment of one of these mortgages, and subsequently purchased and took an assignment of the lease, assuming and paying the other mortgages without knowledge of the judgments, and she also paid large sums to redeem the property from sales for unpaid taxes. The complaint asks a decree declaring defendant's judgments to be subsequent liens to that of the mortgages, and subsequent to the alleged equitable lien for the moneys expended by her to redeem the property. Upon trial at Special Term the court decided in favor of plaintiff substantially in accordance with the prayer of the complaint. *Held*, as stated above.

Thomas Darlington for the appellant.

D. M. Porter for the respondents.

FOLGER, J., reads for affirmance.

All concur.

Order affirmed and judgment absolute against plaintiff.

GEORGE W. RATHBUN 2D, Respondent, *v.* THE NORTHERN CENTRAL RAILWAY COMPANY, Appellant.

A foreign railway corporation cannot claim the benefit of the statute of limitations of this State in an action of which the courts of this State have jurisdiction, although it has before the commencement of the action for the time specified in the statute continuously operated and carried on a railroad in this State, having a large amount of property for all that time within the State and having a managing agent resident therein.

(Submitted June 12, 1872; decided June 20, 1872.)

THIS action was commenced in August, 1869, to recover damages for injuries received by plaintiff when a passenger on the railroad of defendant, a corporation chartered by the State of Pennsylvania, from a disaster thereon in June, 1863, caused by the alleged negligence of defendant's agents and employes.

The answer alleged that for more than six years prior to the action the defendant was the lessee of a railroad in New York, running from the northern line of Pennsylvania to the city of Elmira, N. Y., and had property within this State and a managing agent of the demised railway and property residing at Elmira, who kept an office of the Northern Central Railway Company; therefore claiming that the action did not accrue within six years before suit brought.

To this answer the plaintiff interposed a demurrer, in substance that defendant being a foreign corporation the statute of limitations did not apply. Upon argument the demurrer was overruled at Special Term. On appeal to General Term, this order was reversed and judgment directed on the demurrer.

Afterward the cause was tried before the court without a jury, and judgment rendered and perfected for the plaintiff for $2,500 with costs, which on appeal was affirmed by the General Term of the second judicial department. *Held*, that defendant could not claim the benefit of the statute of limitations and that the demurrer to answer was properly sustained.

George M. Diven for the appellant.

George W. Rathbun for the respondent.

FOLGER, J., reads for affirmance.
All concur.
Judgment affirmed, with costs.

EDWARD HINCKEN et al., Executors, etc., Respondents, *v.* THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, Appellant.

(Argued June 13, 1872; decided June 20, 1872.)

THIS action was upon a policy of life insurance for $10,000 upon the life of Peter Rice, which sum was agreed to be paid "within ninety days after due notice and proof of interest and of the death of said Peter Rice." Upon the trial the only evidence of compliance with this condition was in response to the following question, asked a witness by defendant's counsel: "Did you deliver preliminary proofs?" The witness answered that he did, at defendant's office, and fixed the time more than ninety days before the commencement of the suit. At the close of the evidence defendant's counsel moved to dismiss the complaint upon the ground that plaintiffs were bound to produce in evidence the proofs served, or some proofs, to show a performance of the condition precedent, furnishing due proof of Rice's death ninety days before suit brought.

The motion was denied and plaintiffs obtained a verdict. *Held*, that the fact that preliminary proofs had been delivered was some evidence of the performance of the condition precedent, and these proofs being in defendant's possession, and it not having accounted for or produced them, and having received and retained them, as far as appears, without objection, it would not be assumed that they were defective, and that the evidence was sufficient to sustain the verdict.

Alvin C. Bradley for the appellant.

George G. Reynolds for the respondents.

ALLEN, J., reads for affirmance.
All concur.
Judgment affirmed.

HIRAM CAMPBELL, Respondent, *v.* ALANSON S. PAGE, President, etc., Appellant.

(Argued June 14, 1872; decided June 20, 1872.)

THIS appeal presented for review an order denying a motion for a new trial, which motion was made upon the ground that the evidence did not support the verdict, and that the damages were excessive. Dismissed upon the ground that an appeal to this court from such an order does not lie.

B. B. & G. N. Burt for the appellant.

Samuel Hand for the respondent.

ALLEN, J., reads for dismissal of appeal.
All concur.
Appeal dismissed.

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MARY ANN KILLIP et al., Respondents, *v.* MICHAEL METZEN et al., Appellants.

(Argued September 11, 1871; decided June 20, 1872.)

THIS was an action to compel defendants to deliver up and cancel a mortgage given by plaintiffs under the following circumstances: Defendants contracted to furnish the materials and to build a house upon plaintiffs' premises for a specified sum, to be paid by installments as the work progressed. Defendants proceeded with the work until they had earned two installments, but upon plaintiffs refusing to make the

payments they abandoned it. Subsequently it was agreed between the parties that plaintiffs should execute and deliver to defendants a bond and mortgage for an amount equal to the original contract-price, and for certain expenses for insurance, etc., payable six months from date. Defendants agreed to complete the building according to the plans and specifications of the original contract, provided the title to the mortgaged premises should, upon examination, prove satisfactory. If not they were to hold the bond and mortgage for the work already done. The bond and mortgage were executed, and defendants proceeded to complete the building; but before it was finished it was blown down and destroyed by a violent storm. Defendants declined to erect a new building. The court below decided that plaintiffs were entitled to have the mortgage delivered up and canceled. *Held* (ALLEN and FOLGER, JJ., dissenting), that by the new contract defendants did not reinstate the original contract or resume its performance and risks; that there was no express or implied surrender of the absolute right acquired by plaintiffs' default, and that defendants were entitled to hold the bond and mortgage as security for the work performed under the original contract.

Amasa J. Parker for the appellants.

George C. Stitt for the respondents.

ANDREWS, J., reads opinion for reversal and new trial.
All concur except ALLEN and FOLGER, JJ., dissenting.
Judgment reversed and new trial granted, costs to abide event.

FIRST NATIONAL BANK OF WHITEHALL, Respondent, *v.* JAMES LAMB et al., Appellants.

SAME, Respondent, *v.* SAME, Appellants.

THESE two cases were argued and decided with *First National Bank of Whitehall* v. *Lamb et al.*, (*ante* p. 95).

JACOB S. JACKSON, Appellant, *v.* GRACE SHERIDAN et al., Respondents.

(Argued April 29, 1872; decided November 12, 1872.)

THIS case was argued with *House* v. *Jackson* (*ante*, p. 161). It had reference to the same title and presented the same questions as were considered and disposed of in *Moore* v. *Littel* (41 N. Y., 66), and was decided upon the authority of that case.

E. P. Wheeler and *F. J. Fithian* for the appellant.

D. P. Barnard for the respondents.

PECKHAM, J., reads for affirmance.
All concur.
Judgment affirmed.

MARY H. POWERS, Respondent, *v.* EVERETT P. WHEELER et al., Appellants.

(Argued April 29, 1872; decided November 12, 1872.)

E. P. Wheeler and *F. J. Fithian* for the appellants.

D. P. Barnard for the respondent.

THIS case presented the same questions, and was argued and decided with *House* v. *Jackson* (*ante*, p. 161).

Judgment modified and affirmed as modified.
All concur.

JOHN M. CARPENTER et al., Respondents, *v.* ANNA M. O'DOUGHERTY, Appellant.

(Argued June 6, 1872; decided November 12, 1872.)

DECIDED on authority of *Corn Exchange Ins. Co.* v. *Babcock* (42 N. Y., 613).

Starbuck & Sawyer for the appellant.

Samuel Hand for the respondents.

PECKHAM, J., reads opinion for affirmance.
All concur.
Judgment affirmed, with costs.

WILLIAM S. EDSALL et al., Appellants, *v.* THE CAMDEN AND AMBOY RAILROAD AND TRANSPORTATION CO., Respondent.

No presumptions will be indulged in, in favor of exemptions from common law liability.

While it is competent for common carriers to provide by contract for such exemptions, it must be done in clear and unambiguous terms, and the rule that the language of contracts if ambiguous is to be construed against the party using it should be rigidly applied to such contracts.

(Argued June 6, 1872; decided November 12, 1872.)

THIS action was brought to recover for a quantity of wool destroyed by fire while on the defendant's pier in New York. The wool was shipped at Fort Wayne, Indiana, by the Pittsburgh and Chicago Railway Company. By the bill of lading that company agreed to transport the wool to its station at Pittsburgh (the company to be exempted from loss by fire), and to deliver it to the connecting carrier, where its responsibility as common carrier should cease. The company guaranteed that the through rate should not be over $1.33 per 100 pounds. It carried the property to Pittsburgh and there delivered the same to the Pennsylvania Railroad Company, which company delivered it to defendant, who carried it to New York. Judgment below was ordered for plaintiffs. The General Term reversed the judgment and ordered a new trial.

It is decided here upon authority of *Ætna Ins. Co.* v. *Wheeler* (49 N. Y., 616) and *Babcock* v. *L. S. and M. S. R. R. Co.* (49 id., 491). The opinion also lays down the general proposition stated above.

H. E. Knox for the appellants.

Charles F. Sanford for the respondent.

CHURCH, Ch. J., reads opinion for reversal. ALLEN, GROVER and RAPALLO, JJ., concur; PECKHAM J., not sitting. FOLGER and ANDREWS, JJ., did not hear argument.

Order reversed and judgment below affirmed, with costs.

WILLIAM BAILEY, Respondent, *v.* AUGUSTUS BURLL et al., Appellants.

(Argued June 11, 1872; decided November 12, 1872.)

THIS action was brought against defendants as assessors of the town of East Bloomfield, Ontario county, to recover damages for an alleged illegal assessment.

Plaintiff was assessed by defendants in 1867 the sum of $188.66. He was not in fact a resident of the town. Having failed to pay the tax to the collector, the same was returned by him, and in August, 1868, the supervisor of the town instituted supplementary proceedings under chap. 361 of the Laws of 1867, and on the 19th of September, 1868, an order was granted by the county judge of Ontario county, directing plaintiff to pay the tax or an execution would be issued against him for the amount.

On being served with a copy of said order, plaintiff paid the amount and costs to the county treasurer through his attorney. A verdict was rendered for plaintiff and exceptions ordered to be heard at General Term. The General Term directed judgment on the verdict. *Held* (GROVER, J., dissenting), that the order of the county judge was not authorized by the statute, and was void; that the payment was not compulsory or made under legal duress, but was voluntary, and plaintiff therefore could not recover.

H. O. Chesebro for the appellants.

E. A. Nash for the respondent.

ALLEN, J., reads opinion for reversal and new trial.
All concur except GROVER, J., dissenting, and PECKHAM, J., not voting.
Judgment reversed and new trial ordered.

MARGARET BUDD, Appellant, *v.* ROBERT A. SINCLAIR, Respondent.

(Argued June 12, 1872; decided November 12, 1872.)

DEFENDANT contracted to sell certain premises to plaintiff's assignor and to pay all taxes up to a certain date. He had no title, but a contract to purchase from one Lowry, the owner. Plaintiff accepted a deed from Lowry. This action was brought to recover unpaid taxes. Defendant proved that Lowry had agreed to pay the taxes, and offered to prove that it was agreed, both before and after, and at the time of signing the contract in suit, that he should not personally be called upon to pay the taxes, but that the vendee agreed to look to Lowry. This was excluded, and a verdict was directed for plaintiff. *Held*, no error; that the evidence offered was improper to vary the written agreement, and no consideration for any subsequent agreement was offered to be shown; that the word "agreed," as used, simply meant a promise, and that no consideration could be implied therefrom. Also, that the fact of plaintiff's receiving a deed from Lowry did not affect defendant's liability.

Joshua M. Van Cott for the appellant.

John E. Burrill for the respondent.

PECKHAM, J., reads opinion for affirmance.
All concur.
Judgment affirmed.

The Congregation Shaaer Hash Moin, Respondent, *v.* William Halladay, Appellant.

Where a contract for the sale of lands contains restrictions respecting the use to which the premises are to be applied by the vendee, the vendor has the right to insert in the deed tendered in performance of the contract suitable provisions either in the form of a condition or a covenant to preserve and effectuate these provisions of the contract. If he inserts them in the form of a covenant and the grantee is entitled to a change in the form, or if he has the right to elect that a condition be substituted for a covenant, it is his duty to make his election or to provide the modification required before he can rescind the contract and sue to recover back the purchase-money paid. A mere general objection and refusal to accept the deed tendered is insufficient. (Church, Ch. J., and Peckham, J., dissenting.)

(Argued June 13, 1872; decided November 12, 1872.)

Appeal from a judgment of the General Term of the Superior Court of New York, affirming a judgment in favor of plaintiff, rendered on the report of a referee.

This action was brought to recover $1,000 paid by plaintiffs to defendant, on the execution of a contract, by which the defendant agreed to sell to plaintiff a lot of land on the corner of Fourteenth street and Second avenue. The residue of the purchase-money was to be paid on the 1st day of May, 1864, when the deed was to be delivered. By the terms of the contract the defendant was to sell the land to plaintiff, a Jewish congregation, "to be used for a Jewish synagogue; the building to be erected to recede eight feet from the line of the lot on Second avenue."

At the time of performance defendant tendered a deed containing this covenant: "And the said parties of the second part, for themselves and their successors, covenant and agree with the said parties of the first part, their heirs and assigns, that any building which may be erected upon said premises shall be set back eight feet from the line of Second avenue, and that said premises shall be occupied for a Jewish synagogue."

This plaintiff refused to accept without specifying any objection or proposing any modification. *Held* (Church, Ch.

J., and PECKHAM, J., dissenting), that the deed tendered was a substantial offer of performance, and that defendant was not bound to tender any different one unless plaintiff pointed out some specific valid objection, and offered to accept a deed with the clause in such form as it could show would be more appropriate, and until defendant was thus put in default the action could not be maintained.

Amasa J. Parker for the appellant.

Samuel Hand for the respondent.

RAPALLO, J., read opinion for reversal and new trial.

All concur except CHURCH, Ch. J., and PECKHAM, J., dissenting.

Judgment reversed and new trial granted.

PATRICK MORGAN et al., Respondents, *v.* JAMES MULLIGAN et al., Appellants.

(Argued June 17, 1872; decided November 12, 1872.)

THE prominent point raised upon this appeal was that the findings of the referee before whom the case was tried were defective, in that he omitted to find upon certain issues presented by the pleadings. *Held*, that the proper remedy of the party would have been to apply to the court below for an order requiring the referee to pass upon the questions and re-settle his report as prescribed in *Van Slyke* v. *Hyatt* (46 N. Y., 259); that the objection cannot be made in this court, but the presumption is that the referee has found in harmony with the conclusions of the report upon all questions where the evidence is capable of that construction.

J. M. Smith for the appellants.

Samuel Hand for the respondents.

CHURCH, Ch. J., reads opinion for affirmance.
All concur.
Judgment affirmed.

JOHN JOHNSON, Respondent, *v.* FREDERIC DE PEYSTER, Appellant.

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(Argued June 17, 1872; decided November 12, 1872.)

THIS was an action upon a building contract. The principal question below was as to whether plaintiff, the contractor, had substantially performed his contract. The referee found this issue in his favor upon conflicting evidence. He also found that defendant sustained damage from insufficient and defective work to the amount of $150, which he allowed as recoupment. *Held*, that the question whether the defects were so trivial and insignificant as to justify the finding that the work was substantially performed was a question of fact, and that the amount allowed was not such as to show that the finding of substantial performance was unsustained by evidence; also *held* that evidence of usage, as to measurements in the locality where the building was built, was competent, and became part of the contract. If one of the parties was ignorant of the usage it was not binding, but that was for him to prove.

John N. Whiting for the appellant.

Samuel Hand for the respondent.

GROVER, J., reads opinion for affirmance.
All concur, except PECKHAM, J., not voting.
Judgment affirmed.

S. BALDWIN CHAPMAN, Appellant, *v.* ANDREW S. WHEELER, Respondent.

(Submitted June 11, 1872; decided November 12, 1872.)

A. H. and *W. E. Osburn* for the appellant.

Hagner and *Goodge* for the respondent.

Agree to affirm.
No opinion.
Order affirmed.

ANDREW S. WHEELER, Respondent, *v.* PATRICK SCULLY et al., Defendants, ALEXANDER A. CABRE, Purchaser, Appellant.

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The service of summons by publication in an action for foreclosure under the provisions of subdivision 6 of section 135 of the Code, which provides for service upon unknown parties having an interest in the mortgaged premises, is valid and binding, although it appears that the unknown party is an infant.

(Submitted June 11, 1872; decided November 12, 1872.)

APPEAL from order of the General Term of the Supreme Court in the second judicial district, affirming an order of Special Term directing appellant, the purchaser upon a mortgaged sale herein, to complete the purchase, or in case of his refusal directing a re-sale, holding him liable for any deficiency.

This was an action for the foreclosure of a mortgage executed by defendant, Patrick Scully. Shortly after making the mortgage, and in 1853, the mortgagor left the State and has not since been heard from. Service of the summons was made by publication under subdivision 6 of section 135 of the Code, providing for service upon unknown parties having an interest. Judgment was perfected, and upon the sale the premises were bid off by Cabre, the appellant. He refused to take title and complete the purchase upon the ground that from the length of time which had elapsed it was to be presumed that the mortgagor was dead; that it was as much to be presumed that his heirs-at-law were infants as that they were adults; and if infants the judgment did not bar them, as the service of summons was not sufficient as against infants. Whereupon motion was made to compel him to complete the purchase. *Held*, that if it be conceded that the presumption

was that the mortgagor was dead (as to which the court expressed doubts), and if the unknown heirs were infants, they were bound by the service, as subdivision 6 of section 135 made no exception in case the unknown defendants were infants. But if otherwise, there was no presumption that they were infants; and this was for the puachaser to show, in order to justify his refusal.

S. W. Gaines for the appellant.

A. H. and *W. E. Osburn* for the respondent.

FOLGER, J., reads opinion for affirmance.
All concur.
Judgment affirmed.

ARIAN M. HANCOCK, Respondent, *v.* RAPHAEL M. GOMEZ et al., Appellants.

An agent employed by a trustee to collect a claim, the subject of the trust, has no right to undertake the discharge of the trust, and in an action against him by his principal for refusal to pay upon demand the moneys collected, it is no defence that he has paid it to one claiming to be the *cestui que trust.*

(Submitted June 18, 1872; decided November 12, 1872.)

APPEAL from order of the General Term of the Supreme Court of the first judicial department, reversing a judgment in favor of defendants and granting a new trial.

On July 26, 1862, at Malaga, Spain, the plaintiff, who was United States consul, received from James H. Hewitt, master of the barque Reindeer, belonging to W. A. Sale & Co., of New York, an order on Sale & Co. for the payment to the plaintiff of $176.33½, balance of wages due one John H. Hanson, as mate of said barque, which order the plaintiff subsequently sent to the defendants, with his consular certificate attached, and a direction to Sale & Co. to pay said amount to the defendants. Defendants received the same, and collected of Sale & Co. the amount of money therein mentioned, gave

a receipt therefor, placed it to plaintiff's credit, and acknowledged to plaintiff that they had received it.

Some two or three months after, a woman, calling herself Mrs. John H. Hanson, and claiming to be the widow of said Hanson, came to said Sale & Co. and claimed that she was entitled to said money; whereupon Sale & Co. notified defendants, who paid the money back, and they paid it to her. There was no evidence of the death of Hanson or that the woman was his wife. Some time in April, 1863, a demand of the money was made of defendants on behalf of plaintiff and payment thereof refused.

Held, that plaintiff held the money officially as United States consul for whoever might be entitled thereto, and that defendants, his agent, had no right to undertake to discharge the trust; that the facts were no justification for the return of the money, and that defendants were liable.

Erastus Cooke for the appellants.

B. F. Watson for the respondent.

GROVER, J., reads opinion for affirmance of order.
All concur.
Order affirmed and judgment absolute against defendants.

HOMER MANDEVILLE, Respondent, *v.* HENRY A. GUERNSEY, Appellant.

(Argued April 25, 1872; decided November 12, 1872.)

George B. Bradley for the appellant.

John W. Dininy for the respondent.

For affirmance—CHURCH, Ch. J.
ALLEN, PECKHAM and ANDREWS, JJ., concur.
For reversal—GROVER, FOLGER and RAPALLO, JJ.
Judgment affirmed. No opinion.

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Archibald M. Alleeton et al., Appellants, *v.* Samuel W. Alleeton, Respondent.

The rule that he who seeks to rescind an agreement upon the ground of fraud must place the other party in as good a situation as that in which he was when the agreement was made, is satisfied if the judgment asked for will accomplish that result, and in such a case no offer to return that which was received is necessary.

Accordingly, *held*, that where plaintiffs were induced by the fraudulent representations of defendant, their partner, to sell out their interest in the partnership property for a sum paid in cash, and where the complaint alleged and it appeared that defendant had received more than the amount paid out of the avails of the property, and the judgment asked for was that defendant account for the moneys received and pay over the surplus after deducting the sum paid, that it was not necessary to allege or show an offer to return the money received on the sale.

(Argued June 11, 1872; decided November 12, 1872,)

The complaint alleged that plaintiffs, defendant and one McPherson were partners in conducting certain stock yards at Pittsburg, Pennsylvania; that plaintiffs, induced by the fraudulent representations of defendant (who had the management of the business) that the business was not profitable, and that he in conjunction with them would sell out to McPherson, consented to unite with him in such sale upon being refunded the amount invested by them, and that thereafter defendant represented that he had sold out, and paid to plaintiffs the moneys advanced by them; that in fact defendant did not sell, but retained his interest, and subsequently acquired McPherson's interest; that the business was profitable, and defendant had received large gains and profits. Plaintiffs asked that the sale be declared void, that defendant account for all moneys received by him, and that they have judgment for their portion of the profits under the agreement, less the amount they had received. The case was tried by the court, who found the fraud as alleged, and decided that plaintiffs were entitled to the share of the profits to which they were originally entitled, less the amount received by them on the sale, and that defendant execute a re-transfer to plaintiffs of the interest they

had prior to the sale. Judgment was entered upon the decision, which was reversed by the General Term and complaint dismissed. The General Term decided that no fraud in fact was shown; that plaintiffs' interests were several, not joint; that McPherson or his representatives should have been joined as defendants, and that plaintiffs should have tendered back the sums received by them on the sale. *Held*, that the fraud alleged in complaint was established; that no tender of the amount received was necessary before suit brought, as the judgment sought for and given allowed it to defendant, and this was in fact an actual return of the consideration paid; that the question as to the misjoinder or non-joinder of parties, not having been raised by the pleadings or upon the trial, could not be raised upon appeal.

Homer A. Nelson for the appellants.

J. M. Knox for the respondent.

FOLGER, J., reads opinion for reversal of judgment of General Term and affirmance of that of Special Term.

All concur, except CHURCH, Ch. J., not voting.

Judgment accordingly.

WILLIAM WATSON, Appellant, *v.* DAVID L. GARDINER, Respondent.

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A judgment should not be set aside on account of an improper taxation of costs, or a taxation without notice. A readjustment should be ordered, and the amount of reduction, if any, be deducted from the judgment.

Where two causes of action are set forth in the complaint, and the defendant succeeds in his defence to one of them, but a judgment is obtained against him upon the other, he is not entitled to costs for the successful defence.

Where, in a case tried by a referee, there is no stipulation as to referee fees, it is incumbent upon the party succeeding to show, affirmatively, that the referee was personally present, engaged in the reference, for days enough to make, at the rate of three dollars per day, the sum charged in the bill of costs.

An allowance of ten dollars motion costs, to abide the event in an order granting a reference, is proper.

(Argued November 12, 1872; decided November 19, 1872.)

APPEAL from order of the General Term of the Superior Court of the city of New York, reversing an order of Special Term, which set aside a judgment in favor of plaintiff, and directed a readjustment of costs therein.

The complaint contained two causes of action for professional services of plaintiff as attorney. The referee decided the first in favor of plaintiff and sustained the defence to the second. Upon the taxation of costs defendant presented a bill of costs, claiming he was entitled to them under 2 R. S., 617, § 26. He also objected to the charge in plaintiff's bill for referee fees. The charge was $275. No stipulation was made as to his fees. No proof was made by plaintiff as to the number of days employed by him. It was shown by defendant's affidavit that but thirty-eight days were expended in the trial, including adjournments. By the order of reference, ten dollars costs of motion were allowed, to abide event. The clerk taxed plaintiff's costs as presented, and refused to tax defendant's costs, and judgment was perfected accordingly. The Special Term, upon motion, set aside the judgment, referred back plaintiff's costs for readjustment, directing that the referee's fees be taxed according to the time occupied by him, and to be apportioned between the parties according to the time devoted to each cause of action; that neither party be allowed the ten dollars motion costs, and that defendant be allowed his costs incurred upon the cause of action wherein he succeeded. *Held*, that the judgment should not have been set aside, but a readjustment ordered; that sections 30 and 305 of the Code superseded the provisions of 2 R. S., 617, § 26 (affirming decision in *Stoddard* v. *Clarke*, 9 Abb. [N. S.], 310), and defendant was not entitled to costs; that the referee was only entitled to three dollars per day for the time employed, which plaintiff should show affirmatively, and that plaintiff was entitled to the ten dollars motion costs.

A. R. Dyatt for the appellant.

William Watson for the respondent.

Per curiam opinion for modifying order of General Term as follows: Said order to stand affirmed as far as it reverses that portion of the order of Special Term setting aside plaintiff's judgment, giving costs to defendant and refusing ten dollars motion costs to either party; and reversed so far as it reverses the other part of the order of Special Term, without costs to either party in this court.

All concur.

Ordered accordingly.

CHARLES ABERNETHY, Respondent, v. GEORGE T. KNIGHT, Appellant.

(Argued April 23, 1872; decided November 19, 1872.)

All concur for affirmance, except FOLGER and GROVER, JJ., dissenting.

No opinion.

Judgment affirmed.

THE FARMERS' NATIONAL BANK OF FORT EDWARD, Respondent, *v.* WARREN LELAND et al., Appellants.

(Argued November 18, 1872; decided November 19, 1872.)

APPEAL from order of the General Term of the Supreme Court in the third judicial department, affirming an order of Special Term striking out defendant's answer as sham. The action was upon a promissory note, alleged to have been transferred to plaintiff, for value, before maturity. Defendants denied the transfer upon information and belief, and alleged if transferred it was after maturity, and set up as recoupment damages for breach of contract upon which note was given. The motion to strike out answer was made upon affidavits, showing the transfer of the note before maturity, for a valuable consideration, without notice. The order appealed from was reversed upon authority of *Wayland* v. *Tyson* (45 N. Y., 281), and *Thompson* v. *Erie R. R. Co.* (id., 468).

Pond & French for the appellants.

L. H. Northrup for the respondent.

Order reversed; no opinion.

THOMAS L. PARKER, Jr., et al., Respondents, *v.* MARTIN W. BRETT et al., Appellants.

(Argued November 14, 1872; decided November 19, 1872.)

DECIDED upon the evidence, and upon questions as to the reception and rejection of evidence.

William G. Cooke for the appellants.

E. C. Benedict for the respondents.

PECKHAM, J., reads opinion for affirmance.
All concur.
Judgment affirmed.

HENRY WHITIN, Respondent, *v.* CHARLES H. PENDEGAST et al., Appellants.

(Argued November 16, 1872; decided November 19, 1872.)

PLAINTIFF delivered to defendants, common carriers at Charleston, fifty bales of cotton to be transported to New York in their steamer Star of the South. The bill of lading acknowledged "receipt on board," and the referee so found. In fact, it was on land, and a portion was sent by another ship. Plaintiff received from this ship thirteen bales. The Star of the South was disabled on the voyage; was taken to Baltimore and there discharged her cargo. Plaintiff authorized one Cole to demand and receive from defendants at Baltimore thirty-seven bales. He made the demand and paid the freight but received only twenty-two bales, that being all the purser could identify as belonging to plaintiff. A number of bales, not identified, were taken possession of by

agents of parties claiming cotton by this ship and were forwarded to New York, and of this plaintiff received twelve bales, leaving him three bales short, for which he brought suit and obtained judgment. *Held*, that variance between the finding of the referee, that the cotton was "on board," and the fact, was immaterial. The gravamen of the action was the non-delivery of the three bales in New York in pursuance of the contract. That plaintiff could accept delivery at an intermediate port and such acceptance would terminate the voyage and defendants' liability, but that no such delivery and acceptance appeared in this case. 1st. There was no finding and no fact to authorize it that the cargo of the Star of the South included the thirty-seven bales. 2d. Plaintiff was not bound by any act of Cole in accepting, in common with other claimants, cotton not identified as a delivery, as his authority was simply to demand and receive the thirty-seven bales.

John N. Whiting for the appellants.

Walter Edwards, Jr., for the respondent.

ANDREWS, J., reads opinion for affirmance.
All concur.
Judgment affirmed.

JOHN B. MAYENBORG, Appellant, *v.* STEPHEN HAYNES, Respondent.

The declaration of A. to B., not made with the purpose or belief that it would be communicated to C. or would influence his action, constitutes no estoppel upon A., although C. afterwards hears of it and acts upon it.

(Argued November 15, 1872; decided November 19, 1872.)

APPEAL from order of the General Term of the Supreme Court in the second judicial department, reversing a judgment in favor of plaintiff entered upon a verdict in the City Court of Brooklyn and granting a new trial.

The action was upon a promissory note made by defendant.

The defence was that it was an accommodation note and was received by plaintiff after maturity. The note was made for the accommodation of one Hopke, who transferred it to one Kugeler as security for an antecedent debt. The latter transferred it to plaintiff after maturity. Kugeler testified that when the note became due he presented it to defendant for payment, who replied in substance that he would see about it in two or three days. This conversation was related to plaintiff when he purchased the note, and the latter testified that he supposes he would not have taken the note if this had not been stated to him. The court below charged that if defendant promised to pay the note, and that fact was communicated to plaintiff and he took the note upon the strength of the communication, believing it to be true, it would constitute an estoppel. Defendant's counsel excepted to that portion of the charge, "that if the plaintiff made any advances on the faith of the representations made to him at the time he took the note, then, I think, it would constitute estoppel." The appellant's counsel claimed that this was not a sufficient exception to the charge. *Held*, that the exception brought to the attention of the court the matter complained of and was sufficient, that the declaration of defendant to Kugeler constituted no estoppel and the charge was error.

J. T. Marean for the appellant.

Samuel Hand for the respondent.

FOLGER, J., reads opinion for affirmance.

All concur.

Judgment affirmed.

GERTRUDE W. STARKEY, Respondent, *v.* JOHN KELLY, Appellant.

The fact that at the time of making an ante-nuptial contract the intended husband is indebted to a large amount does not, in the absence of fraud, invalidate the contract.

In an action for the unlawful taking and conversion of a quantity of household furniture, including carpets, etc., upon the question of damages as to the carpets, the court charged that the rule was, "what would be the value to a party if he wanted to get the same articles again." *Held*, no error; that it was proper to include not only their worth in market, but also the value of the labor in cutting, making and putting down.

(Argued November 20, 1872; decided November 26, 1872.)

APPEAL from judgment of the General Term, affirming a judgment in favor of plaintiff entered upon a verdict.

This action was brought to recover damages for an alleged unlawful taking and conversion of a quantity of household furniture.

Plaintiff was the wife of Marquis D. L. Starkey. Prior to their marriage the ante-nuptial contract was executed, by which said Starkey agreed to provide plaintiff with money sufficient to purchase a house and lot and furniture for the same. In accordance with the agreement a house was purchased, and also the furniture in question, which was placed therein. The same was levied upon by defendant, as sheriff, by virtue of an execution issued to him upon a judgment against said Starkey. Evidence was given, upon the part of defendant, tending to show that at the time of the purchase Starkey was largely indebted, and that the debt upon which the judgment was rendered then existed, and upon the part of plaintiff that Starkey was then worth $350,000 over all his debts. The court below charged that if the ante-nuptial contract was in reality executed, as claimed, prior to the marriage, and the goods were afterwards bought under it, there was no defence to the action; also, in reference to the carpets, that the rule would be, what would be the value to a party if he wanted to get the same articles again; that the jury must get at the value the best way they can. To these portions of the charge defendant's counsel excepted.

Held, that the ante-nuptial contract was valid, unless tainted with fraud, which was not shown. That the fact that the intended husband was indebted to a large amount, did not invalidate it; and whether his indebtedness exceeded his assets or not was immaterial; it did not prevent the making of a valid contract. That the charge, therefore, in reference to

the contract, was correct, as was also the rule of damages laid down; that as it appeared the carpets were in use in plaintiff's house, they were worth to her not only their value as goods in market, but also the value of the labor in cutting, making and putting down; in fine, just what the same articles would cost in the same place where and condition in which they were taken. That the last clause in the charge was not a direction or permission to speculate or guess at the value, but simply a direction to get at the value from the testimony.

J. Sterling Smith for the appellant.

William A. Coursen for the respondent.

FOLGER, J., reads opinion for affirmance.

All concur, except GROVER, J., not voting; PECKHAM, J., not sitting.

Judgment affirmed.

CHARLES W. WEEKS, Appellant, *v.* DYER D. S. BROWN, Respondent.

(Argued November 21, 1872; decided November 26, 1872.)

Decided upon the facts in the case.

Amasa J. Parker for the appellant.

Ely & Husbands for the respondent.

GROVER, J., reads opinion for affirmance.

All concur; except RAPALLO, J., not voting.

Judgment affirmed.

HENRY B. KIRKLAND et al., Appellants, *v.* ARTHUR LEARY, Respondent.

(Argued November 21, 1872; decided November 26, 1872.)

APPEAL dismissed upon authority of *Wright* v. *Hunter* (46 N. Y., 409); also affirming doctrine of *Downing* v. *Kelley* (48 N. Y., 433), that resort cannot be had to opinion of General Term to determine whether new trial was granted upon questions of law or fact.

William F. Shepard for the appellants.

John Berry for the respondent.

ANDREWS, J., reads opinion for dismissal of appeal.
All concur.
Appeal dismissed.

JOHN CONSALUS et al., Respondents, *v.* THOMAS H. MAGHER et al., Appellants.

(Argued November 21, 1872; decided November 26, 1872.)

DECIDED upon the facts in the case; the court holding that various rulings as to rejection and reception of evidence claimed to be erroneous could not have affected the judgment.

Charles Jones for the appellants.

E. F. Bullard for the respondents.

Per CURIAM. Opinion for affirmance.
All concur.
Judgment affirmed.

JOSEPH JOHNSON, Respondent *v.*, EDWARD FRIEL, Appellant.

Where one, under a contract with a municipal corporation, has made an excavation in a public street or highway, and refilled the same, it is his duty to know the natural qualities of earth thus thrown out and replaced (*i. e.*, that it will shrink and settle when soaked with water), to anticipate the result upon it of a rain-fall, and to see that during and after a rain it is in a proper and safe condition, or to take such measures of prudent forethought as will protect the public passing by from damage, and for neglect of this duty he is liable to the party injured.

(Argued November 22, 1872; decided November 26, 1872.)

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Archibald M. Alleeton et al., Appellants, v. Samuel W. Alleeton, Respondent.

The rule that he who seeks to rescind an agreement upon the ground of fraud must place the other party in as good a situation as that in which he was when the agreement was made, is satisfied if the judgment asked for will accomplish that result, and in such a case no offer to return that which was received is necessary.

Accordingly, *held*, that where plaintiffs were induced by the fraudulent representations of defendant, their partner, to sell out their interest in the partnership property for a sum paid in cash, and where the complaint alleged and it appeared that defendant had received more than the amount paid out of the avails of the property, and the judgment asked for was that defendant account for the moneys received and pay over the surplus after deducting the sum paid, that it was not necessary to allege or show an offer to return the money received on the sale.

(Argued June 11, 1872; decided November 12, 1872,)

The complaint alleged that plaintiffs, defendant and one McPherson were partners in conducting certain stock yards at Pittsburg, Pennsylvania; that plaintiffs, induced by the fraudulent representations of defendant (who had the management of the business) that the business was not profitable, and that he in conjunction with them would sell out to McPherson, consented to unite with him in such sale upon being refunded the amount invested by them, and that thereafter defendant represented that he had sold out, and paid to plaintiffs the moneys advanced by them; that in fact defendant did not sell, but retained his interest, and subsequently acquired McPherson's interest; that the business was profitable, and defendant had received large gains and profits. Plaintiffs asked that the sale be declared void, that defendant account for all moneys received by him, and that they have judgment for their portion of the profits under the agreement, less the amount they had received. The case was tried by the court, who found the fraud as alleged, and decided that plaintiffs were entitled to the share of the profits to which they were originally entitled, less the amount received by them on the sale, and that defendant execute a re-transfer to plaintiffs of the interest they

had prior to the sale. Judgment was entered upon the decision, which was reversed by the General Term and complaint dismissed. The General Term decided that no fraud in fact was shown; that plaintiffs' interests were several, not joint; that McPherson or his representatives should have been joined as defendants, and that plaintiffs should have tendered back the sums received by them on the sale. *Held*, that the fraud alleged in complaint was established; that no tender of the amount received was necessary before suit brought, as the judgment sought for and given allowed it to defendant, and this was in fact an actual return of the consideration paid; that the question as to the misjoinder or non-joinder of parties, not having been raised by the pleadings or upon the trial, could not be raised upon appeal.

Homer A. Nelson for the appellants.

J. M. Knox for the respondent.

FOLGER, J., reads opinion for reversal of judgment of General Term and affirmance of that of Special Term.

All concur, except CHURCH, Ch. J., not voting.

Judgment accordingly.

WILLIAM WATSON, Appellant, *v.* DAVID L. GARDINER, Respondent.

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A judgment should not be set aside on account of an improper taxation of costs, or a taxation without notice. A readjustment should be ordered, and the amount of reduction, if any, be deducted from the judgment.

Where two causes of action are set forth in the complaint, and the defendant succeeds in his defence to one of them, but a judgment is obtained against him upon the other, he is not entitled to costs for the successful defence.

Where, in a case tried by a referee, there is no stipulation as to referee fees, it is incumbent upon the party succeeding to show, affirmatively, that the referee was personally present, engaged in the reference, for days enough to make, at the rate of three dollars per day, the sum charged in the bill of costs.

reason of the aforesaid contract." Walbridge assigned his interest to Peterson. The work was resumed subsequently, and completed by Peterson, who settled his accounts therefor. By chapter 875, Laws of 1871, the legislature authorized the canal board to open the final accounting, readjust the same, and allow "Mills or his assigns" such sums as should be just and equitable. Under this power the canal board awarded to "Mills or his assigns" $3,615, the amount of the fifteen per cent upon the work done by Mills before the assignment, with interest thereon; also, $656 and interest for materials furnished and used by Mills prior to the assignment. An appropriation was made to pay this award. The motions for mandamus were heard together, as were also the appeals. The Special Term decided that Mills was entitled to the whole sum; granted his motion for a mandamus, and denied that of Peterson. The General Term decided that Peterson was entitled to the fifteen per cent and interest, and Mills to the residue, and modified the orders accordingly. *Held*, that in all respects, save the option of the contractor to do the work under it in case the State resumed, the contract was terminated by the suspension, and the fifteen per cent thereby became due and was due at the time of the assignment, and that therefore Mills was entitled to the whole award.

Samuel Hand for Mills.

Amasa J. Parker for Peterson.

GROVER, J., reads opinion for reversal of order of General Term, and affirmance of that of Special Term.

All concur, except CHURCH, Ch. J., not voting.

Ordered accordingly.

WILLIAM H. CARPENTER, Respondent, *v.* ELMORE P. ROSS, Appellant.

(Argued November 21, 1872; decided December 3, 1872.)

Francis Kernan for the appellant.

J. R. Cox for the respondent.

Agree to affirm; no opinion.
Judgment affirmed.

ELIZA O'LEARY, Appellant, *v.* ANTHONY WALTER, Sheriff, etc., Respondent.

(Argued November 24, 1872; decided December 3, 1872.)

THE prominent question presented was upon exception to the charge of the court. The exception was general. *Held*, insufficient; that a general exception to a charge in which several distinct propositions are stated, some of them correct, brings before the appellate court no one proposition of law which may be claimed to be erroneous.

Wermbergh & Reilley for the appellant.

J. H. Bergen for the respondent.

ALLEN, J., reads opinion for affirmance.
All concur.
Judgment affirmed.

EDWARD B. ARNOLD, Appellant, *v.* JOHN M. ROBERTSON, Respondent. 50 683 114 500

The rulings of this court, that error of law cannot be alleged upon appeal from an order and decision of an inferior court granting or refusing a new trial, where the trial was by jury, and the facts as well as the law were before the court, having been made sufficiently public to render them obligatory upon the public and the profession, if appeals from orders granting new trials are persisted in, instead of dismissals thereof, judgments absolute will be rendered against the appellants, in pursuance of their stipulations upon appeal. (ALLEN, J.; PECKHAM and RAPALLO, JJ., concurring.)

(Submitted November 27, 1872; decided December 3, 1872.)

APPEAL from order of the General Term of the Court of Common Pleas for the city and county of New York, reversing a judgment in favor of plaintiff entered upon a verdict, and reversing an order denying a motion for a new trial, and granting a new trial. The court dismissed the appeal in accordance with the rulings in *Wright* v. *Hunter* (46 N. Y., 409) and *Sands* v. *Crook* (46 id., 564), holding that for the present it was proper to follow the practice adopted in those cases. ALLEN, J., who wrote opinion, held that sufficient publicity had been given to the rulings in those cases, and that in accordance with the intimation in *Dickson* v. *B. & S. A. R. R. Co.* (47 N. Y., 507), the privilege of a dismissal should now cease, and that where parties persisted in such appeals they should be held to their stipulations, and judgments absolute should go against them in this. PECKHAM and RAPALLO, JJ., concurred.

George W. Wingate for the appellant.

J. M. Robertson, respondent in person.

ALLEN, J., read opinion for affirmance of order and judgment absolute against plaintiff. PECKHAM and RAPALLO, JJ., concurred.

For dismissal, CHURCH, Ch. J.; GROVER, FOLGER and ANDREWS, JJ.

Appeal dismissed.

THE PEOPLE ex rel. THE COMMISSIONERS OF HIGHWAYS OF THE TOWN OF ANNSVILLE, ONEIDA COUNTY, Appellants, *v.* WILLIAM WHITMAN et al., Respondents.

(Submitted December 2, 1872; decided December 10, 1872.)

Silas L. Snyder for the appellants.

A. H. Bailey for the respondents.

All concur for affirmance. No opinion.
Judgment affirmed.

SETH A. BEATTIE, Respondent, *v.* THE NIAGARA COUNTY SAVINGS BANK, Appellant.

(Argued December 2, 1872; decided December 10, 1872.)

S. F. Bowen for the appellant.

A. W. Braese for the respondent.

All concur for affirmance. No opinion.
Judgment affirmed.

TITUS B. ELDRIDGE, Respondent, *v.* SAMUEL C. REID et al., Appellants.

(Argued May 2, 1872; decided December 10, 1872.)

W. A. Beach for the appellants.

John K. Porter for the respondent.

All concur for reversal, except RAPALLO, J., not voting. No opinion.
Judgment reversed.

LOUISA C. KOEHLER, Respondent, *v.* JOHN G. KOEHLER, Appellant.

(Submitted December 9, 1872; decided December 17, 1872.)

Henry D. Birdsall for the appellant.

Philip Reilly for the respondent.

All concur for affirmance. No opinion.
Judgment affirmed.

JONATHAN A. SCOVILLE et al., Respondents, *v.* HORACE LANDON, impleaded, etc., Appellant.

An appeal does not lie to this court from an order granting or refusing a new trial on the ground of newly discovered evidence. (*Tracy* v. *Altmayer*, 46 N. Y., 598, distinguished.)

One who has the possession of a negotiable promissory note, with all the evidence of ownership by the act and consent of the owner, may deal with the maker in respect to it, and the owner will be bound by the acts and agreements of the possessor and apparent owner.

Possession by the executor of the payee of a note, payable to the order of the testator and not indorsed, is evidence of ownership.

An extension of the time of payment by a valid agreement between the holder and maker of a promissory note, without the consent of an indorser who has indorsed the note as the surety and for the accommodation of the maker, will discharge the surety.

(Argued December 9, 1872; decided December 17, 1872.)

APPEAL from order of the General Term of the Supreme Court in the eighth judicial district, affirming an order denying a motion for a new trial made on the ground of newly discovered evidence; also appeal from judgment affirming judgment in favor of plaintiffs entered upon a verdict.

The action was brought upon a promissory note made by George Bunce, payable to Samuel C. Scoville or order. The note was indorsed by defendants for the accommodation of Bunce before delivery to the payee, and the ground of defence was that time of payment had been extended without the consent of defendants. Scoville died, and plaintiffs, together with Samuel C. Scoville, son of the deceased, were his executors. Evidence was given, on the part of defendants, showing that at the time the note became due the note was in the hands of the executor, Samuel C. Scoville, unindorsed. The latter made a valid agreement with the maker to extend the time of payment for one year. Plaintiffs claimed title to the note under an alleged contract with their father, made three days prior to his death. The court charged the jury that if they found that plaintiffs owned the note, there was no evidence upon which they were authorized to find that there was an extension of the time of payment of the note.

Held, that the order was not appealable; the court citing *Lawrence* v. *Ely* (38 N. Y., 42); *Bedell* v. *Chase* (34 id., 386); *Selden* v. *D. and H. Canal Co.* (29 id., 634), and stating that in *Tracy* v. *Altmayer* (46 N. Y., 598) the doctrine is recognized that the order, when motion is heard upon the merits, is not appealable. But in that case the order was reversed because the court below erred in refusing to entertain jurisdiction of the motion. Also *held*, as stated above.

E. B. Vedder for the appellant.

John Ganson for the respondents.

ALLEN, J., read opinion for dismissal of appeal from order and for reversal of judgment and granting new trial.

All concur for dismissal of appeal from order, and all concur for reversal, except GROVER, J., who dissents upon the ground that it did not sufficiently appear by the evidence that the executor, by whom it is claimed the agreement was made to extend time of payment, had it in his possession at the time, or that the maker, in making the agreement, relied upon such possession or evidence of ownership.

Appeal from order dismissed, and judgment reversed and new trial granted.

EDWARD K. COLLINS, Respondent, *v.* CHARLES I. HALL, Appellant.

(Argued December 9, 1872; decided December 17, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of plaintiff entered on a verdict.

Plaintiff, being the owner of a certain patent right, entered into a contract with defendant by which he authorized the latter to make, use and vend the patented article, to sell and convey territory, and to license others to make, use and vend, and generally to control the patent as if he were patentee; defendant agreeing to pay plaintiff one-half the net profits as fast as

received, upon demand. It was also agreed the plaintiff might, on or before January 1st, 1870, elect to take, in lieu of the other provisions, $1,500 for his whole interest in the letters patent, which defendant agreed to pay, with interest, after February 1st, 1869, deducting all sums received by plaintiff under the contract. The contract was left in defendant's possession. In November, 1869, plaintiff served upon defendant a notice, electing to take the $1,500, which he required defendant to pay January 1st, 1870, with interest for one year. Plaintiff called upon defendant after the 1st of January, offered to make out a deed of the patent, and expressed himself ready to fulfill the contract, and demanded the money. Defendant denied making the contract and refused to perform. Plaintiff brought action to recover the $1,500. Defendant alleged that the contract was never executed or delivered. Upon the trial, the notice served by plaintiff was offered in evidence. It was objected to generally. It appeared that plaintiff took possession of and retained the letters patent, and papers referring thereto. He testified, and the evidence tended to show, that he so took possession after defendant repudiated the contract. Defendant testified that it was before. Defendant's counsel requested the court to charge that, if plaintiff took possession before January 1st, 1870, it was a material circumstance for the jury to consider on the question of delivery of the contract. This the court refused to do, but charged that plaintiff was entitled to the papers until the money was paid to him and deed executed. Defendant's counsel also asked for a nonsuit, upon the ground that there was no assignment or offer to assign the letters patent to defendant, which was denied. *Held*, that no specific defect in notice having been pointed out, defendant could not, upon appeal, raise the question that it was defective in that it asked for interest from January 1st instead of February 1st; that it was not material upon the question of delivery of the contract when plaintiff took possession of the papers; and that the charge of the judge, that he had a right to retain them, was proper; also, that, assuming that the delivery of a deed for the patent and the payment of the money were dependent covenants,

the plaintiff having expressed a willingness to perform, and defendant having repudiated the contract and refused to pay, a formal tender of a deed was unnecessary.

James C. Cochrane for the appellant.

W. F. Cogswell for the respondent.

PECKHAM, J., reads opinion for affirmance.
All concur, except CHURCH, Ch. J., not sitting.
Judgment affirmed.

CHARLES BARKER, Appellant, *v.* JOHN J. COCKS, et al., Respondents.

Where an action is brought against two or more upon a joint contract, an equitable defence peculiar to one defendant being set up by him, the court may give judgment for the plaintiff against the other defendants, and for the one defendant against the plaintiff.

Upon argument of demurrer to defendant's answer, the Special Term ordered that defendant have judgment on the demurrer, with leave to plaintiff to amend his complaint or reply, on payment of costs. Upon appeal, the General Term affirmed the order, and directed that defendant have judgment on the demurrer, as provided in the order of Special Term. Upon this defendant entered what purported to be a judgment, adjudging that the order of Special Term be affirmed, and that defendant recover an amount named as costs. *Held*, that this was not a final judgment in the action, and was not appealable to this court.

(Argued December 13, 1872; decided December 17, 1872.)

THIS was an action against defendants, who were formerly copartners, to recover $3,300 loaned to the firm. The answer of defendant Cocks alleged that plaintiff and another executed to him their joint and several bond, in a penalty of $5,000, a copy of which was annexed to answer. The bond contained a recital of the former existence of the copartnership between defendants, and the dissolution thereof, and that certain of its assets had been transferred to defendant Boker for collection and sale. The condition of the bond was that Boker should pay to Cocks the amount which he should be

entitled to receive from the assets, and, upon final accounting, should pay over such sums as he (Cocks) should be entitled to receive. The answer then alleged an action brought by defendant Cocks upon the bond, and a recovery thereon of $3,699.80, besides interest and costs. That plaintiff, when sued upon the bond, owned the claim sought to be recovered here, and could have availed himself of it by way of set-off, or in reduction of the amount to be recovered, and was bound so to use it, and, having failed, could not recover against defendant Cocks in this action. That defendant was ignorant of plaintiff's claim until the commencement of this suit, and that defendant Boker was and is insolvent. Said defendant also set up the bond as a counter-claim, claiming the difference between the penalty and the recovery thereon.

Plaintiff demurred to the answer. On argument at Special Term it was ordered that said defendant have judgment on the demurrer, with leave to plaintiff to amend his complaint or reply to the answer, on payment of costs. Upon appeal to the General Term, its order was that the order of the Special Term be affirmed with costs, and that defendant have judgment on the demurrer, as provided in the order of the Special Term, with costs. Upon this order, what purported to be a judgment was entered, ordering and adjudging that the order of Special Term be affirmed, and that defendant Cocks recover $132.18 costs, and that he have execution therefor. *Held*, that the claim of plaintiff should have been paid out of the assets of the firm. If it had been so paid, or if in this action upon the bond plaintiff here had proved the claim, the recovery of defendant Cocks would have been reduced by one-half the claim, *i. e.*, $1,650. In either case, the claim would have been satisfied. That plaintiff could have availed himself of his claim in the former action, as his debt was a lien in equity upon the assets in the hands of Boker; that it was his duty to have so done, and as, by his negligence or willful act, his claim was kept out of the adjustment in the suit upon the bond, and as defendant Cocks is without remedy, unless entitled to it in this action, he has an equity entitling

him to the interposition of the court of equity; and as the Supreme Court has jurisdiction in this action of this equitable defence, it has the power to give him a several judgment against the plaintiff, and the plaintiff a several judgment against defendant Boker; that the demurrer was, therefore, properly overruled.

It was, however, held that the paper purporting to be a judgment of the General Term was not a final judgment in the action, and was not appealable to this court.

John H. Bergen for the appellant.

George W. Parsons for the respondent.

FOLGER, J., reads opinion for dismissal of appeal.
All concur.
Appeal dismissed.

JOHN GRAHAM, Appellant, *v.* ADIA A. SELOVER, Respondent.

(Argued December 13, 1872; decided December 17, 1872.)

DECIDED upon the facts in the case.

Joseph A. Shoudy for appellant.

Colcs Morris for the respondent.

PECKHAM, J., reads opinion for affirmance.
All concur.
Judgment affirmed.

ANDREW R. CULVER et al., Appellants, *v.* THE WESTERN UNION TELEGRAPH COMPANY, Respondent.

(Argued December 16, 1872; decided December 24, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, affirming

a judgment in favor of plaintiff, entered upon a verdict directed by the court.

Defendant executed to Culver, one of the plaintiffs, who were custom-house brokers and partners, a power of attorney, which, after reciting that the United States collector of customs, of the port of New York, charged and exacted a duty in excess of that allowed by law upon telegraph wire imported by defendant, appointed Culver its attorney, and authorized him to endeavor to recover by suit or otherwise such excess of duties which had been or might hereafter be exacted; plaintiffs to pay all expenses, and to receive as compensation one-half the sums so recovered. Under this power plaintiffs obtained a refund of duties upon two cargoes of wire, and received the stipulated compensation. Two other cargoes arrived subsequently. The collector refused to enter them, except upon payment of the excessive duty. Defendant thereupon directed the dismissal of plaintiffs and the employment of other brokers. It appeared that the sum thus fixed by the collector was not a determination of what should finally be paid; that, after the entry of goods, they are to be examined by appraisers, whose duty it is to determine the quality and value and rate of duty to be charged; that, after this is done, the amount of duty is computed by the liquidating clerk, and this computation determines the amount to be paid. This was done in this case. The amount of duty so ascertained was as claimed by defendant; and the excess of duty charged was refunded, as in all cases where the amount received upon entry was found to be in excess of what was thus found to be payable. Plaintiffs claimed that the deduction in this case was made for the reason that a letter from the treasury department, directing what rate should be charged upon that kind of goods, was received by the collector, the writing of which was induced by an appeal made by plaintiffs' for other parties. *Held*, that the duty could not be regarded as charged and exacted within the meaning of the power of attorney until the amount was determined and liquidated in accordance with the usual custom; that the contract embraced only cases where the duties had finally been fixed and charged by the custom-house authorities, and

where something was necessary to be done after their action was completed, either by suit or appeal to the treasury department to obtain a refund. Also, held that the power of attorney was revocable. In case of revocation after commencement of services to procure a refund, defendant would be liable to pay for services already rendered by plaintiffs upon the basis of the agreement, *i. e.*, one-half of the amount that could have been obtained, less the real value of the services thereafter necessary to be performed in obtaining it.

George W. Soren for the appellants.

John H. Bergen for the respondent.

GROVER, J., reads opinion for reversal and new trial.
All concur.
Judgment reversed.

NELSON W. FOOTE, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

MARY A. NORRIS, Respondent, *v.* SAME, Appellant.

THOMAS BULGER, Respondent, *v.* SAME, Appellant.

DANIEL G. EASTMAN, Respondent, *v.* SAME, Appellant.

JAMES LESTER, Respondent, *v.* SAME, Appellant.

MURDY B. SMITH, Respondent, *v.* SAME, Appellant.

(Argued December 17, 1872; decided December 24, 1872.)

A. P. Laning for the appellant.

George W. Cothran for the respondents.

JUDGMENT reduced to one penalty, and excess of fare paid without costs to either party. No opinion.

These cases presented the same question as in *Fisher* v. *N. Y. C. and H. R. R. R. Co.* (46 N. Y., 644).

WILLIAM M. BACON, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

ROBERT S. KOCH, Respondent, *v.* SAME, Appellant.

(Argued December 16, 1872; decided December 24, 1872.)

A. P. Laning for the appellant.

George W. Cothran for the respondent.

JUDGMENTS from single penalty affirmed with costs. No opinion.

JESSE M. HUGHES et al., Respondents, *v.* HENRY BILLINGHURST, impleaded, etc., Appellant.

(Argued December 18, 1872; decided December 24, 1872.)

James C. Cochrane for the appellant.

E. A. Raymond for the respondents.

ALL concur for affirmance on opinion of Gardner, referee.

Judgment affirmed.

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WILLIAM WALLACE, Respondent, *v.* MARGARET FEE, Appellant.

(Argued December 18, 1872; decided December 24, 1872.)

THE parties were seized each of a portion of lot twenty-nine in the city of Rochester, deriving title from a common source; by that the west boundary of the lot was given as "the east line of Clyde street." Plaintiff's deed (which was the prior one) conveyed to him the north half of the lot, and also the northerly half of a dwelling-house situate thereon, described as "fronting on Clyde street," with the land on which it stands, "being about sixteen feet square, with the

appurtenances," etc. The south-west corner of the north half of the house projected about seven feet upon the south half of the lot. Defendant's deed conveyed to him the south half of the lot, excepting and reserving therefrom the land upon which plaintiff's half of the dwelling-house stands. At the date of the deeds the west side of the house was upon the east line of Clyde street, as opened and used. Subsequently the city authorities changed the street, moving the east line thereof to the westward four feet ten inches. Plaintiff took possession of and inclosed the space thus left in front of his half of the house. Defendant tore down the fence, claiming title as far north as the north line of the south half of the lot. Plaintiff sued for the trespass.

Held, 1st. That the original title, and the right of possession of the parties, as derived therefrom, extended no further west than the east line of Clyde street, as it then was. 2d. That the language of the description in plaintiff's deed carried his right to the center of the street; and when the public abandoned its easement plaintiff became entitled to the exclusive use of that part of the street abandoned, adjacent to and in front of his half of the house; that in either view defendant had no right in or title to the *locus in quo*, and was therefore liable. The case of *Comstock* v. *Johnson* (46 N. Y., 615) distinguished.

James C. Cochrane for the appellant.

George F. Danforth for the respondent.

FOLGER, J., reads for affirmance. All concur.

ANDREWS and RAPALLO, JJ., upon the ground that plaintiff was in possession and defendant had shown no title.

Order affirmed, and judgment absolute againt defendant.

HENRY DEBBE, Respondent, *v.* FREDERICK DEBBE, Appellant.

(Argued December 17, 1872; decided December 24, 1872.)

THIS was a motion by appellant to dismiss appeal upon

affidavit that plaintiff had released the claim and acknowledged satisfaction of judgment below. The motion was resisted by plaintiff's attorney, who claimed a lien for his costs, and that the alleged settlement was fraudulent, and made to deprive him of costs. The case presented no grounds for appeal, and it appeared plaintiff was in extreme poverty and almost an imbecile. The court granted the motion upon payment of costs to respondent's attorney to the time of motion, and ten dollars costs of opposing, with proviso that if the condition was not complied with in twenty days these motions be denied, with ten dollars costs; the parties being remitted to the court below to test the validity of the satisfaction piece.

John H. Reynolds for motion.

Mr. Sackman opposed.

ALLEN, J., reads opinion for dismissal on payment of costs, and ten dollars costs of motion; if not paid within twenty days, then for denial of motion with ten dollars costs.

All concur.

Ordered accordingly.

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LEVANTIA S. CARPENTER, Respondent *v.* ZARA H. BLAKE Appellant.

In an action against a surgeon for malpractice, the question as to whether or not he is skillful in his profession is one of the material issues. If he has not competent skill, he is censurable for holding himself out as possessing it, and is strictly accountable for the consequences of his acts; and having adopted a process which was not successful, to the exclusion of one which might, and probably would have proved so, he is not entitled to the benefits which would inure to the skillful surgeon from an error of judgment, or mistake in the appliances and means at command of the expert.

Accordingly, *held* (CHURCH, Ch. J., PECKHAM and GROVER, JJ., dissenting), that a charge to the jury that it was immaterial whether the defendant was or was not reputed to be, or was or was not a skillful surgeon, was error.

(Argued June 14, 1872; decided December 24, 1872.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth department, affirming a judgment in favor of plaintiff entered upon a verdict.

The action was brought against defendant, as a surgeon, for malpractice, in treating a dislocated elbow joint. Evidence was given upon the part of defendant tending to show he was reputed to be and was a skillful surgeon.

The court charged in substance that it was entirely immaterial to the inquiry whether defendant, at the time he undertook the reduction of the dislocation, was or was not reputed to be, or was or was not a skillful surgeon. *Held*, error (CHURCH, Ch. J., PECKHAM and GROVER, JJ., dissenting); various other questions were discussed in the prevailing opinion, but were not agreed to by a majority of the court.

Henry R. Selden for the appellant.

S. D. Faulkner for the respondent.

ALLEN, J., reads opinion for reversal and new trial.

FOLGER, RAPALLO and ANDREWS, JJ., concur upon the first ground discussed.

PECKHAM, J., reads opinion for affirmance. CHURCH, Ch. J., and GROVER, J., concur.

Judgment reversed.

AARON ERICKSON et al., Respondents, *v.* MARY A. QUINN, Appellant.

(Argued December 17, 1872; decided December 24, 1872.)

PLAINTIFFS, as judgment creditors of one O'Malley, framed their complaint herein as in a creditor's suit, alleging a fraudulent conveyance of certain lands by the judgment debtor to defendant, asking the appointment of a receiver and a sale of the property; and, after a first trial of the action and pending an appeal, they issued an execution upon their judgment against O'Malley, and advertised the property for sale. A motion was made to set aside the execution upon some ground

undisclosed, but not that the two remedies were incompatible. It was stipulated that no sale should be had until after decision of the appeal. The judgment was reversed. Plaintiffs then caused the property to be sold, and became purchasers for the full amount of their claim. The action was then treated as one to remove obstructions to their judgment. Upon the second trial, the referee decided that the conveyance to defendant was fraudulent and void as against plaintiffs, and that their judgment was a lien upon the property. This judgment was affirmed by the General Term and by this court (47 N. Y., 410), and judgment perfected below upon remittitur. Defendant thereupon, and upon showing the fact of the sale above mentioned after commencement of the action, and his ignorance thereof, obtained an order setting aside that judgment, and judgment of Supreme Court, and the report of the referee, and giving leave to defendant to file a supplemental answer, setting up the facts claiming the sale satisfied the judgment upon which this action was based. This order was reversed by the General Term. *Held*, that plaintiffs had a legal as well as equitable right to the benefit of their original judgment and the fruits of that action, and were not bound to waive or abandon their lien and substitute the equitable lien under their *lis pendens* in this action of a later date; and that, under the facts disclosed on the motion, plaintiffs were entitled to the relief they obtained; that there was no fraud or legal irregularity in proceeding with the action, and, pending it, selling the property upon execution. Also, *held* as stated in memorandum next following.

James C. Cochrane for the appellants.

George F. Danforth for the respondents.

ALLEN, J., reads opinion for affirmance of order of General Term.

All concur, except CHURCH, Ch. J., not voting.

Order affirmed.

AARON ERICKSON et al., Respondents, *v.* MARY A. QUINN, Appellant.

(Argued December 17, 1872; decided December 24, 1872.)

THIS was a motion in the case next preceding to set aside and vacate the judgment of this court in the action (46 N. Y., 410), upon the ground that, during the pendency thereof, plaintiff had sold the property in controversy, and became the purchaser at sheriff's sale, bidding the full amount of their judgment, and thus satisfying it. *Held*, that, whether plaintiff had in fact obtained satisfaction depended upon the validity of the title acquired under the sheriff's deed, and that judgment in this action was necessary to establish that title; that by it the obstacle to their recovery and the cloud upon their title is removed; that the two proceedings were harmonious, and both necessary to give the plaintiffs the relief sought. Motion therefore denied.

J. C. Cochrane for the appellant.

G. F. Danforth for the respondents.

ALLEN, J., reads opinion for denial of motion.
All concur, except CHURCH, Ch. J., not voting.
Motion denied.

DANIEL FITZHUGH et al., Respondents. *v.* WILLIAM H. SACKETT, Appellant.

(Argued December 20, 1872; decided December 24, 1872.)

DEFENDANT was the owner of certain real estate, upon which was a mortgage held by plaintiffs' testator. One Elisha B. Sackett, a brother of defendant, induced the mortgagee to receive certain drafts, purporting to be accepted by defendant, and to assign the mortgage to him. The acceptance was in fact by another William H. Sackett, who was entirely irresponsible. Elisha B. Sackett was in no manner bound to

pay the mortgage. The transaction was unauthorized by defendant, who was entirely ignorant of it at the time, but who was informed of it a few months thereafter. The mortgage was subsequently satisfied of record, without any consideration being paid by defendant, who sold the premises freed from the incumbrance. The action was brought to recover the amount of the drafts. The case was before this court in 1866, presenting nearly the same facts. The court then held that, defendant having full knowlege of the fraud before the transfer of the premises by him, and he thus having availed himself of the advantages secured thereby, he ratified the acts of his assumed agent, and was bound by the representations of the latter. Appellant's counsel claimed that the doctrine thus laid down had been overruled by *Henry v. Wilkes* (37 N. Y., 562). But *held* (CHURCH, J., dissenting), that the former decision should be regarded as the law of the case, and will not be disturbed; that *Henry* v. *Wilkes* differed from this case in this, that in that case the person who had, without authority, assumed to act as defendant's agent in borrowing money to pay off an incumbrance was himself, as between him and defendant, bound to pay the incumbrance; that defendant, therefore, did not claim the benefit of the contract of the assumed agent in making the loan, but claimed under the contract of the agent with him.

George F. Danforth for the appellant.

Scott Lord for the respondents.

Per CURIAM. Opinion for affirmance
All concur, except CHURCH, Ch. J., dissenting.
Judgment affirmed.

WILLIAM C. ROWLEY, Appellant, *v.* LAUREN C. WOODRUFF, Respondent.

(Argued December 19, 1872; decided December 24, 1872.)

APPEAL from judgment of the General Term of the

Supreme Court in the fourth judicial department, entered upon an order denying motion for a new trial. The court upon the trial nonsuited the plaintiff and ordered the complaint to be dismissed, and ordered exceptions to be heard at first instance at special Term.

This action was brought to recover the last installment due upon a contract between one Farquharson and defendant, and assigned by the former to plaintiff.

Farquharson contracted to sell to defendant an interest in a patent right already in use for bleaching paper and pulp, and also an interest in a patent right that had been applied for but not obtained for preparing the material and reducing it to pulp preparatory to bleaching, for a sum in gross.

Farquharson agreed to put "the said process" in operation at once in the mill of defendant, and did provide and put in successful and satisfactory operation the process for bleaching. Defendant paid a part of the purchase-price at the time of making the contract, and agreed to pay the balance by installments; one installment as soon as the process should be put in successful operation and prove to be all that was claimed for it, and the residue say twelve or eighteen months from the making of the contract. All the payments but the last were made. The patent for preparing and reducing the material to pulp proved a failure. It was a condition of the payment of the several amounts that the "said process shall work successfully and practically, and shall perform with the economy and dispatch that is claimed for it." *Held*, that the condition referred solely to the process for bleaching, and, as that did work as agreed by the condition, the plaintiff was entitled to recover.

George F. Danforth for the appellant.

Cyrus E. Davis for the respondent.

ALLEN, J., reads opinion for reversal and new trial.
All concur.
Judgment reversed.

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ACCEPTANCE.

See CONTRACTS, 4.

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See ESTOPPEL, 7.
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ALIMONY.

1. Alimony and allowance for expenses will not be allowed in an action for divorce brought by one claiming to be a wife, where marriage, in fact, is denied by the answer, until the actual existence of the marital relation is proved to the satisfaction of the court, or is admitted. The court, however, is not limited to the allegations of the complaint and the denials of the answer. If other legitimate proofs are submitted which make out, in the judgment of the court, a fair presumption of the fact of marriage, it has power to make the allowances. (PECKHAM, J., dissenting.) *Brinkley* v. *Brinkley*. 184.

2. For the purposes of temporary alimony it is not necessary that the fact of marriage be so conclusively established as will be required for permanent alimony or other ultimate purposes of the action. If the putative wife make out a reasonably plain case of the existence of the marital relation, she should be furnished with the means of temporary support and of conducting the suit until the truth or falsity of her allegations can be ascertained by the proofs formally taken in the case. (PECKHAM, J., dissenting.) *Id.*

3. Where, therefore, upon an application for temporary alimony and an allowance for expenses, the facts undisputed are such as that from them a presumption arises that the parties were married, so that the affirmative rests upon defendant to repel that presumption, the court has jurisdiction and power to grant the application, although marriage, in fact, is denied, and the opposing papers show facts irreconcilable with the existence thereof, or of matrimonial cohabitation. (PECKHAM, J., dissenting.) *Id.*

4. A denial in the answer of the allegation of the complaint that the plaintiff was, at the time of exhibiting her complaint, an actual resident of this State, does not take from the court the power to make such allowances, nor does an allegation of the answer that, before the bringing of the action, plaintiff had brought another action for the same cause against defendant in a court of another State. These are issues in the cause, and the fact of marriage being established the court has power to take from

the means of the defendant to enable plaintiff to establish her allegations. *Id.*

AMENDMENT.

See STATUTES, 7.

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APPARENT OWNER.

1. One who has the possession of a negotiable promissory note, with all the evidence of ownership by the act and consent of the owner, may deal with the maker in respect to it, and the owner will be bound by the acts and agreements of the possessor and apparent owner. *Scoville* v. *Landon* (Mem.). 686

2. Possession by the executor of the payee of a note, payable to the order of the testator and not indorsed, is evidence of ownership. *Id.*

See BILLS, NOTES, CHECKS, 2, 3.
PRINCIPAL AND AGENT, 4, 5.

APPEAL.

1. An order of General Term reversing an order of Special Term sustaining a demurrer, is not appealable to this court. *Coit* v. *Stewart.* 17

2. The provisions of the Code regulating the formal proceedings in an action do not, simply because they are statutory regulations, necessarily become of the substance of the remedy or substantial in their character. (Per ALLEN, J.; CHURCH, Ch. J., PECKHAM, J., concurring.) *McCoun* v. *N. Y. C. R. R. Co.* 176

3. An order denying motion to set aside a summons and complaint upon the ground that the notice inserted in the summons is not under the right subdivision of section 129 of the Code, where the complaint was served with the summons, does not affect a substantial right, and is not appealable to this court. (GROVER and FOLGER, JJ., dissenting.) *Id.*

4. Upon appeal from an order which may have been matter of discretion the appellant must show that it was made upon a ground that did not authorize the court to exercise any discretion; otherwise the appeal will be dismissed. *Cushman* v. *Brundrett.* 296

5. The time to appeal in cases coming under the fourth subdivision of section 11 of the Code is not limited. (PECKHAM, J.) *Id.*

6. In an action upon a promissory note, tried by the court, where the defence is one not available as against a *bona fide* holder, in which position plaintiff claims to stand, after the receipt of all the evidence as to the *bona fides* of the transfer to plaintiff, and an announcement upon the part of the defendant that he has no more to offer upon that subject, if in the opinion of the court the testimony established the fact that plaintiff is a *bona fide* holder, it is not bound to receive the evidence offered to sustain the defence, and the decision cannot be reviewed by this court, although enough was shown to have required the submission of the question thus determined to a jury, had the case been tried by a jury. *Brookman* v. *Milbank.* 378

7. Although a case contains no findings of fact or exceptions, if the judgment below is materially modified by the General Term the party injuriously affected by the modification has the right, upon appeal to this court, to a review of the question as to the correctness of the modification. *Hart* v. *Wandle.* 381

8. Where a general objection to proof offered is sustained, error will not lie if any true ground of objection exists. But if the proof is objectionable simply upon a ground which might be obviated, if specified, and such objection is not made, but is purposely suppressed, while others not tenable are stated, the former will be deemed to have been waived and cannot be urged to sustain the ruling upon appeal. *Height* v. *The People*. 392

9. Where a judgment in an action tried by the court or a referee is reversed by the General Term and new trial ordered upon questions of fact, the General Term is not required to specify, in its order, the particular errors of fact to authorize a review in this court; it is sufficient if the order states generally that the reversal was based wholly, or in part, upon errors of fact. *Hubbell* v. *Meigs*. 480

10. An appeal from an order does not authorize the review and reversal of any other order, however closely the two may be united. *In re Com. of Central Park*. 493

11. The provision of the act regulating the opening and laying out of streets, etc., in the city of New York, which declares that the reports of commissioners of estimate and assessment, appointed under it, when confirmed, shall be "final and conclusive" (§ 178, chap. 86, Laws of 1813; 2 R. S., 408), was not repealed or affected by the general provisions of the Code prescribing the jurisdiction of this court (Code, § 11), and an order confirming the report of commissioners of estimate and assessment appointed in proceedings by the commissioners of the Central Park under the act for the laying out and improvement of certain portions of the city of New York (chap. 697, Laws of 1867), which proceedings were governed by the act of 1813, is not appealable to this court. *Id.*

12. The right to a preliminary injunction or to an injunction *pendente lite* rests in all cases in the discretion of the court of original jurisdiction. An order, therefore, dissolving such an injunction does not affect a substantial right, and is not reviewable in this court. *The People* v. *Schoonmaker*. 499

13. It does not follow from an allegation or averment of a litigant of the unconstitutionality of a particular law which enters into or even which may be the foundation of a litigation, that every order made in the progress of the action involves the constitutionality of such law within the meaning of subdivision 4 of section 11 of the Code, as enacted in 1865. *Id.*

14. *It seems* that to bring a case within that provision, the court in making the order complained of must have passed directly upon the constitutional question, and the intent of the legislature was to restrict such appeals to cases in which a law of the State is declared unconstitutional and a party thus deprived of some right given by the statute. *Id.*

15. An order denying a motion for a reargument, which motion is based upon the ground that a justice who heard and decided the case below sat as a member of the court upon the hearing of appeal from the judgment, is appealable to this court. *Graham* v. *Linden*. 547

16. Where the record shows that other justices heard and decided the case at General Term, this is not contradicted by proof that the justice before whom the case was tried, as presiding justice of the General Term, called the case when reached upon the calendar, and made some inquiries of counsel as to the papers. *Id.*

17. A defendant has not an absolute legal right to have the facts upon which plaintiffs' claim for equitable relief depends, tried by a jury. The mode of trial, in such cases, is a matter of discretion with the court, and its decision, in respect thereto, is not reviewable in this court. *Colman* v. *Dixon*. 572

18. A defendant has no absolute right to a preliminary order set-

tling issues in an action for equitable relief to be tried by a jury. A refusal to grant such an order does not necessarily deprive the defendant of his right to such trial. If he has that right and the cause is brought to trial before the court without a jury the defendant may then object, and it will be the duty of the court to order the cause to be tried by a jury. If the court refuse so to do, defendant's remedy is by appeal from judgment. *Id.*

19. An appeal to this court from an interlocutory order is premature and improper. *Id.*

20. On appeal from a judgment dismissing complaint in an equity action, with costs, the General Term modified the judgment by granting a portion of the relief prayed for, and affirmed it as thus modified. *Held*, that the General Term, in making their decision, necessarily held that the Special Term should not have dismissed the complaint, but should have granted that portion of the relief sought embraced in the modification, and that the form of the judgment was technically erroneous; but that the error was one of form merely, except as the question of costs was concerned; and as costs were in the discretion of the court below, this court would not disturb the judgment upon that ground. *Brooks* v. *Curtis.* 639

21. The rulings of this court, that error of law cannot be alleged upon appeal from an order and decision of an inferior court granting or refusing new trial, where the trial was by jury, and the facts as well as the law were before the court, having been made sufficiently public to render them obligatory upon the public and the profession, if appeals from orders granting new trials are persisted in, instead of dismissals thereof, judgments absolute will be rendered against the appellants, in pursuance of their stipulations upon appeal. (ALLEN, J.; PECKHAM and RAPPALLO, JJ., concurring.) *Arnold* v. *Robertson* (Mem.). 683

22. An appeal does not lie to this court from an order granting or refusing a new trial on the ground of newly discovered evidence. *Scoville* v. *Landon* (Mem.). 686

23. Upon argument of demurrer to defendant's answer the Special Term ordered that defendant have judgment on the demurrer, with leave to plaintiff to amend his complaint or reply, on payment of costs. Upon appeal, the General Term affirmed the order, and directed that defendant have judgment on the demurrer, as provided in the order of Special Term. Upon this defendant entered what purported to be a judgment, adjudging that the order of Special Term be affirmed, and that defendant recover an amount named as costs. *Held*, that this was not a final judgment in the action, and was not appealable to this court. *Barker* v. *Cocks* (Mem.). 689

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APPOINTMENTS.

See JUSTICES OF THE SUPREME COURT, 1.

ARBITRATION.

1. Where no charge of corruption or bad faith in the arbitrators is made mere errors of judgment are no grounds for setting aside an award, and neither party will be allowed to prove for that purpose that the arbitrators decided wrong as to the law or the facts. *Perkins* v. *Giles.* 228

2. An award that is sufficiently certain to be obligatory as a contract is valid. *Id.*

3. The rule that an agreement to arbitrate is not sufficient to oust a court of law or equity of jurisdic-

tion, is a departure from the general principle that effect should be given to contracts when lawful in themselves according to their terms and the intent of the parties, and it will not be extended or applied to new cases not coming within the letter and spirit of the decisions already made. *D. & H. C. Co.* v. *Pa. Coal Co.* 250

4. Where by the same agreement which creates a liability, and gives a right, it is made a condition precedent to a right of action thereon, either in express terms or by necessary implication, that certain facts shall be determined or amounts and values ascertained by arbitrators in case the parties cannot agree thereon; in case of such disagreement, and in the absence of fraud there is no cause of action, under the agreement, either at law or in equity, until the award is made as provided. *Id.*

5. By an agreement between the parties, upon the completion of a contemplated enlargement of plaintiff's canal, defendant covenanted to pay additional toll, the amount of which was to be arrived at by ascertaining or estimating the cost of transportation before the enlargement, and also such cost after the enlargement, and one-half of such portion of the reduction as should be estimated to have been produced solely by the enlargement should be the additional toll thereafter to be charged; and in cases of disagreement between the parties as to the amount of reduction, and the portion thereof produced by the enlargement, the same should be determined by arbitrators. In an action to recover additional toll, and to fix the amount thereafter to be charged, —*Held*, That the right of plaintiff to demand and the obligation of defendant to pay additional toll was restricted to the rate to be established pursuant to the agreement, and, until thus ascertained and established, defendant could not be put in default and plaintiff had no cause of action. *Id.*

ASSESSMENT AND TAXATION.

1. The provisions of the acts known as the tax levies for the city of New York for the years 1863 (chapter 227, Laws of 1863), 1867 (chapter 586, Laws of 1867) and 1868 (chapter 853, Laws of 1868), limiting the number of official papers to be employed, and selecting the officers of the corporation to designate them, fall within the general subject indicated by the titles to those acts, that is, the raising of money for the support and government of that city and regulating the expenditure thereof, as their effect is to limit the expenditure; they are, therefore, not repugnant to the sixteenth section of article 8 of the Constitution, providing that no local or private bill shall embrace more than one subject, and that shall be expressed in the title. *In re Astor.* 363

2. These provisions being general in their nature, and not being restricted in their operations by the terms of the acts, remained in force until changed by the legislature. *Id.*

3. Under the act of 1868 the New York Leader was selected as an official newspaper. There was no change made in 1869 either in the power to appoint or the appointment. A resolution and ordinance was adopted by the common council in 1869 for the paving of a portion of Fourteenth street with Nicolson pavement. This was not published in the Leader. *Held*, that the appointment of that paper, as an official newspaper, continued; and the proceedings not having been published as required by section 7 of the amended charter of 1857 (chapter 446, Laws of 1857), the assessment for the purposes of the work was void. *Id.*

4. An assessment for local improvements under the act of 1871, amending the act reorganizing the local government of New York (chap. 574, Laws of 1871), is invalid unless the commissioner of public works has certified to the

board of assessors the amount of expenses paid or actually incurred by the city, as required by section 5 of said act. No other evidence can be substituted. *In re Cameron.* 502

5. An assessment was made for paving a portion of Madison avenue. The certificate of the commissioner only stated the prices fixed by the contract for the work. It was accompanied by an affidavit of the surveyor stating the amount of work done, but the affidavit was not referred to in the certificate or made part thereof. *Held*, that the provision of the act was not complied with, and the assessment was void. *Id.*

6. In an application to vacate an assessment under the act in relation to frauds in assessments for local improvements in the city of New York (chap. 338, Laws of 1858), the *onus* of establishing the alleged fraud or irregularity is upon the applicant, and he must make it appear that such fraud or irregularity exists before he is entitled to the relief sought. *In re Bassford.* 509

7. A single publication of a resolution authorizing a specific improvement in the city of New York two days before its adoption is a sufficient compliance with the provision of the city charter of 1857 (§ 7, chap. 446, Laws of 1857), which prohibits the passage or adoption of such resolution until it has been published in all the newspapers employed by the corporation at least two days. (Opinion of INGRAHAM, J., note.) *Id.*

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See N. E. Co. v. *McNamara* (Mem.), 653.
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See JUDGMENT, 1, 2.
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People ex rel. Mills v. *Dayton* (Mem.), 681.

ATTACHMENTS.

1. It is not competent for a creditor to institute an action in order to make a proper case for issuing an attachment, or to place property in a situation to be subject to that process. The provisions of the Code, in reference to attachments (title 7, chap. 4, §§ 227 to 245), constitute a complete system for collecting debts in the cases and manner therein specified. The mode therein provided must be pursued; and unless property is so situated as to be attachable and convertible, according to these provisions, it cannot be attached. *Thurber* v. *Blanck.* 80

2. Debts and choses in action are to be regarded, under the attachment laws, as legal assets, whenever the attachment acts directly upon a legal title; but when they are so situated as to require the exercise of the equitable powers of the court to place them in that situation, they are to be treated as equitable assets only. (GROVER, PECKHAM and FOLGER, JJ., dissenting.) *Id.*

3. No authority is conferred to institute actions to reach mere equitable assets, or to bring in other parties for the purpose of attacking transfers of such property as fraudulent; that is the office of a creditor's bill, founded upon a judgment and execution. *Id.*

4. Accordingly *held*, that an attaching creditor could not maintain an independent action, in the nature of a creditor's bill, to set aside an alleged fraudulent assignment by the debtor of a bond and mortgage which the sheriff had attempted to attach by leaving with the obligor a certified copy of the attachment, with notice. *Id.*

5. Also *held* (GROVER, PECKHAM and FOLGER, JJ., dissenting), that the sheriff had no authority to bring an action against the assignee for that purpose, and to subject the bond and mortgage to the operation of the attachment. *Id.*

6. Where actions have been commenced in this State by a foreign corporation upon subscriptions to its capital stock, and where a warrant of attachment has been issued against such corporation, by virtue of which the sheriff has attached the debts sought to be recovered in such actions, the sheriff has the right, under section 237 of the Code, to assume the prosecution thereof, either in his own name or in that of the original plaintiff. They can also be prosecuted by the plaintiff in the attachment proceedings, upon giving the bond required by section 238. *O'Brien* v. *G. W. Co.* 128

7. Where several attachments have been issued and one of the attaching creditors assumes the prosecution of such actions, this does not conclude the others or operate as a bar to their claims. Until the debts are collected and appropriated to the payment of the attaching creditors in the order of their priority, they are in the custody of the law, and the sheriff is responsible to the party legally entitled thereto for whatever shall be collected in the pending actions. He is a proper party, therefore, to bring an action against the adverse claimants of the fund to settle and establish their respective rights, or an action can be brought for that purpose by another of the attaching creditors. *Id.*

8. In case, however, it is determined that the attaching creditor who prosecuted the actions is not entitled to the avails of the collections, he or his attorney is entitled to the costs recovered therein. *Id.*

9. Whether upon the decease of the sheriff, in whose name an action has been instituted, to determine the rights of attaching creditors, his successor can be substituted as plaintiff, *quere*. The latter, as official successor and as trustee for all concerned, is a proper party. *Id.*

ATTORNEY'S LIEN.

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AWARD.

1. Where no charge of corruption or bad faith in the arbitrators is made, mere errors of judgment are no grounds for setting aside an award, and neither party will be allowed to prove for that purpose that the arbitrators decided wrong as to the law or the facts. *Perkins* v. *Giles*. 228

2. An award that is sufficiently certain to be obligatory as a contract is valid. *Id.*

See People ex rel. v. *Mills* (Mem.), 681.

BAILMENT.

1. Although in an action against a bailee for loss of or damage to goods by accident the burden of proof of negligence rests upon the plaintiff, yet the nature of the accident itself may afford *prima facie* proof of negligence. If it is one which in the ordinary course of events would not have happened but for the want of proper care on the part of the bailee, it is incumbent upon him to show that he took proper precautions; and his failure to furnish this proof, which, if it existed, would have been in his power, may subject him to the inference that such precautions were omitted. *J. R. M. Co.* v. *N. H. S. Co.* 121

2. Plaintiff's goods, while upon defendant's wharf, were destroyed by fire occurring in the night-time, originating upon the wharf. A large quantity of other freight was upon the wharf and was also destroyed. Evidence was given tending to show that no apparatus or

means for extinguishing fires were kept there. A private watchman was left in charge, with some colored men, but neither he nor any of them were produced as witnesses, nor did it appear that he was at his post, or that any person was upon the wharf when the fire broke out. *Held*, that the evidence was such as to require the submission of the question of negligence to the jury, and that a direction of a verdict for defendant was error. *Id.*

BANKRUPTCY.

Plaintiff brought suit to recover damages for the breach of a contract between the parties for the sale and delivery of a quantity of whisky. After trial was had, decision rendered against defendants, and costs adjusted, defendant U. filed his petition in bankruptcy. After this, and on the 26th January, 1868, plaintiff perfected and docketed his judgment. On the 10th July, 1868, U. obtained his discharge as a bankrupt. On the 1st July, 1871, plaintiff issued execution, and U. moved for a perpetual stay as to him, which was granted. *Held*, 1st. That the motion and order were in accordance with the practice, and defendant had lost no opportunity of pleading his discharge so as to forfeit the favor of the court; that a stay of proceedings under the twenty-first section of the bankrupt act would not have availed him in setting up his discharge, as it could only have intervened after trial, and he still would have been helpless without an order of the Supreme Court to open the case or let him in to plead *puis darrein*, and that the motion after the discharge was obtained was just as proper. 2d. That defendant had not been guilty of such "gross laches" in making the motion as to deprive him of the right to the relief sought. 3d. That plaintiff's claim was not merged in the judgment so completely as to extinguish it and prevent the operation of the discharge. 4th. That as at the time defendant filed his petition the whole amount of plaintiff's claim was ascertained, it was a debt provable under the bankrupt act against the bankrupt's estate; and that, therefore, the stay was properly granted. *Monroe* v. *Upton*. 593

BANKS AND BANKING.

When a forged certification of a check is presented, at the bank upon which the check is drawn, to the teller whose certificate it purports to be, and he pronounces it genuine, he adopts the certification, and the bank is bound by it the same as if it was genuine. *C. Nat. Bk.* v. *Nat. Bk. of C.* 575

See NATIONAL BANKS.

BILLS, NOTES, CHECKS.

1. Where one indorses a promissory note payable to another or order, prior to its delivery to the payee, in the absence of proof that he indorsed with intent to become surety for the maker to the payee, the legal presumption is that he stands in the position of subsequent indorser; and the payee can neither maintain an action upon the indorsement, nor can he transfer a right of action thereon to a purchaser with notice, except upon assuming the responsibility of first indorser. *Phelps* v. *Vischer*. 69

2. An individual negotiating for the purchase of a bill of exchange or promissory note from one having it in possession, and whose name appears upon it, must assume that the title of the holder as well as the liability of all the parties is precisely that indicated by the instrument. *Central Bank* v. *Hammett*. 158

3. The presumption arising from the fact of possession of a bill of exchange by the drawee and acceptor, is that it is in his possession for acceptance or after payment; such possession gives no apparent ownership or presumptive right to transfer the same. (PECKHAM, J. dissenting.) *Id.*

4. The possession by an assumed agent of a promissory note payable to the order of the payee, and not indorsed by him, is not alone sufficient evidence of his authority to authorize a payment thereof to him. *Doubleday* v. *Kress.* 410

5. The payee of such a note delivered it to an agent with authority to receive the interest thereon, and to take a new note with an indorser. The maker paid principal and interest to the agent. In an action by the payee upon the note,—*Held* (CHURCH, Ch. J. and GROVER, J., dissenting), that the agent was not authorized to receive payment of the principal in money, and that plaintiff was entitled to recover. *Id.*

6. Defendant was sued as indorser upon a note containing a statement that the maker had deposited with the payee certain collaterals with authority to the latter to sell, without notice, in case of non-payment; these collaterals came to plaintiff's hands when it became holder of the note. When payment of the note was demanded of the maker he demanded of the notary presenting it a return of the collaterals, stating his readiness and willingness to pay upon production thereof; the notary did not have them. *Held*, that the demand and refusal were insufficient to charge the indorser; that to constitute a valid demand the collaterals should have been produced, or had in readiness to be surrendered upon payment. *O. National Bank* v. *Hunt.* 474

7. One who has the possession of a negotiable promissory note, with all the evidence of ownership by the act and consent of the owner, may deal with the maker in respect to it, and the owner will be bound by the acts and agreements of the possessor and apparent owner. *Scoville* v. *Landon* (Mem.). 686

8. Possession by the executor of the payee of a note, payable to the order of the testator and not indorsed, is evidence of ownership. *Id.*

9. An extension of the time of payment by a valid agreement between the holder and maker of a promissory note, without the consent of an indorser who has indorsed the note as the surety and for the accommodation of the maker, will discharge the surety. *Id.*

See CONVERSION.
ESTOPPEL, 2, 6.
PLEADINGS, 3.

BONA FIDE HOLDERS.

Defendants, stock brokers in New York, received from one Van A., residing at Lyons, orders by telegraph to buy 2,100 shares of Erie stock, he agreeing to send margin. On the day of sending and receipt of telegrams defendants contracted for the stock ordered, to be delivered three days thereafter, at which time they were delivered to and paid for by defendants. On the day of the sending of the telegrams, but whether before or after does not appear, Van A. stole $6,500 of U. S. coupon bonds belonging to plaintiff, which he forwarded to defendants as a "margin." The bonds were received by the defendants before the delivery of and payment for the stock. In an action for the conversion of the stock,—*Held*, that defendants gave credit to the promise of Van A., and not to the bonds; that the receipt of the bonds and the fulfillment of the contract for the purchase of the stock after such receipt did not make them *bona fide* holders, and that they were therefore liable; also, that if defendants, after receipt of the bonds, purchased upon the credit thereof any stocks for Van A., they were entitled to hold them as security for any loss arising in that transaction, but the sale of bonds beyond the amount necessary for such indemnity was a conversion, for which an action would lie. *Tuft* v. *Chapman.* 445

See HUSBAND AND WIFE, 3.
TRIAL, 2.

BROOKLYN (CITY OF).

1. The provision of the third section of the act of 1833 (chap. 319, Laws of 1833) amending the act incorporating the (then) village of Brooklyn, which authorizes the taking of the residue of any lot upon the written consent of the owner, where a portion thereof is required for the opening of a street, etc., provides no way for divesting the title of infants to lands not required for the contemplated improvements. *Battell* v. *Burrill.* 13

2. Neither the general guardian nor the guardian *ad litem* of an infant has power to give consent, and the only mode of transferring his title to the city is by proceedings pursuant to the Revised Statutes for the sale of infants' estates. *Id.*

BUFFALO (CITY OF).

N. E. Co. v. *McNamara* (Mem.), 653.

BUILDING CONTRACTS.

See CONTRACTS, 3, 4.
Killip v. *Metzen* (Mem.), 658.
Johnson v. *De Peyster* (Mem.), 666.

BURDEN OF PROOF.

See ASSESSMENT AND TAXATION, 6.
BAILMENT, 1.

CANAL BOARD.

People ex rel. Mills v. *Dayton* (Mem.), 681.

CANAL CONTRACTS.

People ex rel. Mills v. *Dayton* (Mem.), 681.

CASES REVERSED, OVERRULED, CRITICISED OR EXPLAINED.

Springer v. *Dwyer* (58 Barb., 189), reversed. *Springer v. Dwyer.* 19

Heinemann et al. v. *Heard et al.* (58 Barb., 524), reversed. *Heinemann et al.* v. *Heard et al.* 27

First National Bank of Whitehall v. *Lamb et al.* (57 Barb., 429), reversed. *First National Bank of Whitehall* v. *Lamb et al.* 95

Miller v. *White et al.* (57 Barb., 504; 59 Barb., 434), reversed. *Miller* v. *White et al.* 137

Goodwin et al. v. *Balt. & Ohio R. R. Co.* (58 Barb., 195), reversed. *Goodwin et al.* v. *Balt. & Ohio R. R. Co.* 154

Case of The Protector (12 Wall., 700), explained. *McStea* v. *Matthews.* 170

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Price v. *Oswego & Syracuse R. R. Co.* (58 Barb., 599), reversed. *Price* v. *Oswego & Syracuse R. R. Co.* 213

Hurst v. *Litchfield* (39 N. Y., 377), criticised. *President, etc., D. & H. Canal Co.* v. *Penn. Coal Co.* 265

Scott v. *Avery* (5 H. of L. C., 811), explained. *President, etc., D. & H. Canal Co.* v. *Penn. Coal Co.* . 267

In re Will of John Kellum (6 Lans., 1), reversed. *In re Will of John Kellum.* 298

White v. *Carroll* (42 N. Y., 161), explained. *Marsh* v. *Ellsworth et al.* 313

Verona Cent. Cheese Co. v. *Murtaugh* (4 Lans., 17), reversed. *Verona Cent. Cheese Co.* v. *Murtaugh.* 314

Miner v. *Beekman et al.* (42 How. Pr., 33), reversed. *Miner* v. *Beekman et al.* 337

Adams v. *Davidson* (6 Seld., 313), explained. *Bullis et al.* v. *Montgomery et al.* 359

Howard Ins. Co. v. *Scribner* (5 Hill, 298), overruled. *Ogden* v. *East River Ins. Co.* 390

Germond v. *Jones* (2 Hill, 569), explained. *Moncrief* v. *Ross et al.* 436

Campbell v. *Johnston* (1 Sand. Ch., 148), explained. *Moncrief* v. *Ross et al.* 436

People ex rel. Furman et al. v. *Clute* (42 How. Pr., 157), reversed. *People ex rel. Furman et al.* v. *Clute.* 451

McCabe v. *Swap* (14 Allen, 188), explained. *Graham* v. *Linden.* 552

People v. *Hills* (35 N. Y., 449), explained and distinguished. *People ex rel. City of R. et al.* v. *Briggs et al.* 561

CAUSES OF ACTION.

1. It is not competent for a creditor to institute an action in order to make a proper case for issuing an attachment, or to place property in a situation to be subject to that process. The provisions of the Code, in reference to attachments (title 7, chap. 4, §§ 227 to 245), constitute a complete system for collecting debts in the cases and manner therein specified. The mode therein provided must be pursued; and unless property is so situated as to be attachable and convertible, according to these provisions it cannot be attached. *Thurber* v. *Blanck.* 80

2. No authority is conferred to institute actions to reach mere equitable assets, or to bring the other parties for the purpose of attacking transfers of such property as fraudulent; that is the office of a creditor's bill founded upon a judgment and execution. *Id.*

3. Accordingly *held*, that an attaching creditor could not maintain an independent action, in the nature of a creditor's bill, to set aside an alleged fraudulent assignment by the debtor of a bond and mortgage which the sheriff had attempted to attach by leaving with the obligor a certified copy of the attachment, with notice. *Id.*

4. Also *held* (GROVER, PECKHAM and FOLGER, JJ., dissenting), that the sheriff had no authority to bring an action against the assignee for that purpose, and to subject the bond and mortgage to the operation of the attachment. *Id.*

5. The owners of property adjoining a street in the city of New York, laid out under the act of 1813, have an easement in the street, in common with the whole people, to pass and repass, and also to have free access to their premises; but the mere inconvenience of such access occasioned by the lawful use of the street by a railroad is not the subject of an action. *Kellinger* v. *Forty-second Street and Grand Street Ferry Railroad Company.* 206

6. Plaintiff's complaint alleged that defendant laid its track so near the sidewalk, in front of his premises, as not to leave sufficient space for a vehicle to stand, and that he and his family are thereby incommoded in leaving and returning to their residence, and the rental value of his premises is greatly depreciated. On demurrer,—*Held*, the complaint did not contain a cause of action. *Id.*

7. Where a common carrier without requiring evidence of identity delivers goods to a stranger, which have been fraudulently ordered by the latter in the name of a fictitious firm, and which have been shipped in compliance with the order directed to the fictitious firm, he is liable to the consignor for their value. (CHURCH, Ch. J., dissenting.) *Price* v. *Oswego and Syracuse Railroad Company.* 213

8. Where a will gives to the executor no authority to sell the testator's real estate or control over it, but with the knowledge of the heirs he

applies to the court and obtains an order authorizing him to sell, and with the consent and at the request of the heirs he does negotiate a sale, receives the purchase-money and conveys by deed, the heirs also informing the purchaser that the executor is the authorized agent to make the sale, the purchaser has a right without further inquiry to rely upon the truth of such assurances, and the heirs are estopped from disputing them or thereafter asserting title to the land conveyed upon the ground of want of authority in the executor. And where the purchaser has paid the contract-price, entered into possession, and made valuable improvements, with the knowledge of the heirs, he can maintain an action against them to compel them to execute a conveyance to him so as to give him a valid title of record. *Fuvill* v. *Roberts*. 222

9. Where the power is conferred upon public officers or a municipal corporation to make improvements, such as streets and sewers, and keep them in repair, the duty to make them is *quasi* judicial or discretionary, and for a failure to exercise the power or an erroneous estimate of the public needs, no civil action can be maintained. But when the discretion has been exercised and the improvement made, the duty of keeping it in repair so as to prevent its being dangerous to the public is ministerial, and for a negligent omission to perform it an action by the party injured will lie. *Hines* v. *City of Lockport*. 236

10. Where by the same agreement which creates a liability, and gives a right, it is made a condition precedent to a right of action thereon, either in express terms or by necessary implication, that certain facts shall be determined or amounts and values ascertained by arbitrators in case the parties cannot agree thereon; in case of such disagreement, and in the absence of fraud there is no cause of action, under the agreement, either at law or in equity, until the award is made as provided. *Prest., etc., D. & H. C. Co.* v. *Penn. Coal Co.* 250

11. The firm of C. & S. were liable as principals upon certain drafts held by M. C. Defendant was liable thereon as surety. M. C. brought suit upon the draft against all the parties thereto. S., who had assumed the liability of the firm of C. & S., entered into a contract with defendant by which defendant was to provide for and take up the drafts in the first instance, but S. was eventually to pay them and save defendant harmless therefrom. Before the making of this agreement plaintiff had promised to indorse the notes of S. for the purpose of settling the suit. He was fully apprised of the agreement. Defendant paid the drafts and settled the suit. Plaintiff in ignorance of that fact indorsed the notes of S., payable to the order of M. C., and delivered them to defendant for the purpose of taking up the drafts. Defendant procured the indorsement of M. C. thereto and transferred them to a *bona fide* purchaser. In an action for the conversion of the notes,—*Held*, that as the purpose for which plaintiff indorsed and delivered the notes to defendant was not accomplished by them, the latter acquired no title to them; that he had no right to use them as security for what he had before paid for S., and was therefore liable. *Develin* v. *Coleman*. 531

12. Although in ordinary cases the courts will not, in advance of any present duty, declare the rights and obligations of suitors, yet they will do so where peculiar circumstances render it necessary to the preservation of right. *Cohen* v. *N. Y. Mut. Life Ins. Co.* 610

See COMMON CARRIER, 3.
CONTRACTS, 6.
INSURANCE (LIFE), 4.
LIMITATION OF ACTIONS, 4.
PLEADINGS, 1, 2.
PRINCIPAL AND AGENT, 2, 3.
Bailey v. *Buell* (Mem.), 662.
Wallace v. *Fee* (Mem.), 694.

CHATTELS.

See HUSBAND AND WIFE, 2, 4.

CHATTEL MORTGAGES.

See CONSTRUCTIVE NOTICE, 1, 2.

CIVIL WAR.

See INSURANCE (LIFE).
PARTNERSHIP, 2.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. A requisition upon the sheriff in an action to recover the possession of personal property, only protects him in taking the property specified from the possession of the defendant named. Where, however, the actual possession remains in the defendant, although there has been a transfer of title and a constructive change of possession, the process is a protection. *Bullis* v. *Montgomery*. 352

2. One W. executed to plaintiffs, on a Saturday, an assignment of certain personal property for the benefit of creditors. On the Sunday following plaintiff B. obtained from one of W.'s workmen the keys of the shop where the property was, and that night B. went to the shop, unlocked and locked the door, but did not go in. Defendants, M. and S., commenced an action against W. to recover possession of the property, claiming to rescind a sale thereof to him for fraud. Under a requisition issued therein to defendant O., as sheriff, he took the property at 1 A. M. Monday. W.'s workmen left the shop as usual Saturday evening, and returning to resume work Monday morning, found the sheriff in possession. *Held* that, as far as the sheriff was concerned, the property still remained in W.'s possession. Also, *held*, that declarations of W., made before his purchase of the property of M. and S., were not competent as evidence against plaintiffs, and that upon the examination of W. as a witness, questions as to whether he considered himself responsible, and whether he was of good credit at the time of the purchase, were proper. *Id.*

CODE OF PROCEDURE.

§ 11. *See* APPEAL, 4.
§§ 78, 97. *See* LIMITATION OF ACTIONS, 2, 3, 6, 7.
§ 79. *See* LIMITATION OF ACTIONS, 6.
§ 129. *See* SUMMONS.
§§ 237 to 245. *See* ATTACHMENTS, 1.
§§ 237, 238. *See* ATTACHMENTS, 6.

COMMISSION.

1. The right of a party to an action to have the evidence of witnesses taken upon commission, and the power of the court to award a commission, depends solely upon the statute. *McColl* v. *S. M. Ins. Co.* 332

2. Under the statute (2 R. S., 394, §§ 11, 12, 23), a commission is not authorized unless an issue of fact is joined, and is depending when the application therefor is made, and the right to the trial of the issue appears upon the record. *Id.*

3. Accordingly, *held*, that an order awarding a commission made after the judgment and appeal, and while the appeal was pending undetermined, was erroneous. (GROVER, J., dissenting.) *Id.*

COMMON CARRIERS.

1. Where a shipper of property takes from the carrier a bill of lading, receipt or other voucher expressing the terms and conditions upon which the property is to be transported, the writings, in the absence of proof of fraud or mistake, must be taken as the evidence, and the sole evidence, of the final agreement of the parties, and by it their duties and liabilities must be regulated. Resort cannot be had to prior parol negotiations to vary its terms. *Long* v. *N. Y. C. R. R. Co.* 76

2. Where it has been the long continued practice of a manufacturing company to ship its goods daily by a regular line of steamboats, consigned to its agent for

sale, and it has been part of the regular routine of business of the agent, without notice, to call for and receive the goods upon their arrival each day at the carriers' wharf at the place of destination, and to remove them, a specific notice from the carrier of the arrival of each parcel is not necessary. The duty of the carrier, as such, is performed when the goods are landed at the accustomed place and the consignee has had a reasonable time to remove them. But if the goods are received upon a holiday, and it has been the usage for the consignee not to receive goods upon those days, he is entitled to a reasonable time after that day to remove them. *J. Russell Manufacturing Co.* v. *New Haven Steamboat Co.* 121

3. Where bulky articles of freight are landed from a vessel in the customary manner upon a public wharf, with due notice to the consignee (he being the owner), who pays the freight and takes steps toward removing them, and is afforded a reasonable opportunity of doing so, the legal custody is transferred to him, and if he unnecessarily delays the removal, he does so at his own risk. It is his duty, not the carrier's, to protect them, and if they are injured by inclement weather, the carrier cannot be held responsible. *Goodwin* v. *B. & A. R. R. Co.* 154

4. No presumptions will be indulged in, in favor of exemptions from common law liability. *Edsall* v. *C. & A. R. & T. Co.* (Mem.). 661

5. While it is competent for common carriers to provide by contract for such exemptions, it must be done in clear and unambiguous terms, and the rule that the language of contracts if ambiguous is to be construed against the party using it should be rigidly applied to such contracts. *Id.*

See NEGLIGENCE, 1, 3, 4.
Whitin v. *Pendegast* (Mem.), 674.

CONFLICT OF LAWS.

See NATIONAL BANKS, 3.

COMPLAINT.

See PLEADING, 1, 2.

CONDITIONS.

See ARBITRATION, 3, 4.
CONTRACT, 1.
INSURANCE (LIFE), 2, 4, 6.
VENDOR AND VENDEE, 4.
Rowley v. *Woodruff* (Mem.), 700.

CONSIDERATION.

See Budd v. *Sinclair* (Mem.), 663.

CONSIGNOR AND CONSIGNEE.

See COMMON CARRIER, 2, 3, 6.

CONSTITUTION.

1. A written Constitution must be interpreted rather with reference to its special and general intent and the ordinary and usual sense of the phraseology than to the literal and technical meaning of the words used. *People* v. *Fancher.* 288

2. The words "in session," as used in section nine of article six of the State Constitution, which authorizes the governor, when the senate is not in session, to fill temporarily, by appointment, a vacancy in the office of justice of the Supreme Court, indicate a present acting or being of the senate as a body. When the sittings are terminated by a long adjournment, and the actual meetings of the body thus interrupted, although the session is continued, the senate is not in "session" within the intent and meaning of that section, and an appointment made by the governor during such an adjournment is valid. *Id.*

See CONSTITUTIONAL LAW, 1, 3.
CRIMINAL TRIAL, 1.

CONSTITUTIONAL LAW.

1. The fact that courts-martial were authorized by statute prior to or soon after the adoption of the first Constitution of this State; that when the subsequent Constitutions were framed these tribunals thus authorized were in the open and continued exercise of their authority; that when in either of the Constitutions existing courts were abolished or modified, it was done by express provision, and that there is no provision in terms modifying or abolishing courts-martial, are evidence that no such abolition was intended. The fact, therefore, that they are not included in the courts authorized to be established by the legislature by the provisions of the new judiciary article adopted in 1869 (Const., art. 6, § 19) does not by implication prohibit their establishment. Courts-martial are also necessary incidents to the "discipline" of the State militia and the provision of the Constitution requiring the militia to be "armed and disciplined" (art. 11, § 1); also the provision that no person shall be held to answer for a capital or otherwise infamous crime except on indictment, except in cases of the militia, etc. (art. 1, § 6), recognize their existence. They are, therefore, constitutional. *People ex rel.* v. *Daniell.* 274

2. The legislature has the power to direct the enforcement of valid judgments by imprisonment in case property cannot be found. The provision, therefore, of the Military Code of 1870 (§ 214, chap. 81, Laws of 1870), authorizing the arrest of a delinquent in case sufficient goods and chattels cannot be found to satisfy a fine or penalty imposed by court-martial, is constitutional. *Id.*

3. By the Constitution of the United States the whole subject of foreign intercourse is committed to the federal government, and upon all questions relating thereto it alone can speak and act. It has the exclusive power to regulate, provide for and control the surrender of fugitives from justice from foreign countries. The provision, therefore, of the Revised Statutes (1 R. S., 164, §§ 8–11) providing for such surrender is unconstitutional, and a warrant issued by the governor in pursuance thereof is void. *The People ex rel.* v. *Curtis.* 321

4. The statutory provision declaring that no supervisor of any town shall be elected or appointed to hold the office of superintendent of the poor (chap. 80, Laws of 1853), does not infringe upon the constitutional rights of an elector to vote for all elective officers (§ 1, art. 2, State Constitution), nor upon his right to be elected to any office. *People ex rel.* v. *Clute.* 451

5. Where the power is reserved to the legislature to direct the method of filling an office, whether by election or appointment, it may in its discretion, when conferring upon the elector the power to elect, limit the number from whom he may select, or declare one holding another office ineligible to receive his suffrage. *Id.*

6. *It seems* the same legislative power exists in reference to offices created or continued by the Constitution, and thereby made elective. *Id.*

7. If the title of an act fairly and reasonably announces the subject, and that is a single one, and if the various parts thereof have respect or relate to that subject, the provision of the Constitution that no local or private bill shall embrace more than one subject, and that shall be expressed in its title (State Constitution, art. 3, § 16), is complied with. The degree of relationship of each provision is not material if it legitimately tends to the accomplishment of the general purpose. *In re Mayer.* 504

8. The general subject of local improvements includes not only the plan and construction of contem-

plated work, but the means by which the work may be accomplished, the proceedings necessary to be adopted for assessing and paying the expenses and the remedies to parties for redress of grievances arising out of their construction. *Id.*

9. The act, therefore, entitled "An act in relation to certain local improvements in the city of New York" (chapter 580, Laws of 1872), is not violative of said constitutional provision, and an assessment under it for constructing a sewer will not be vacated for an omission to file a plan of sewerage, embracing the sewer in question, where no fraud is shown. (Section 7 of said act.) *Id.*

10. A statute cannot be held unconstitutional or defective where it may be completely executed without any violation of a constitutional provision, or any further action by the legislature. *Id.*

11. The provisions of the act entitled "An act in relation to the erection of public buildings for the use of the city of Rochester," which provides that the commissioners to be appointed thereunder shall select, as a site for a city hall, either certain lands therein mentioned owned by the city, or some other piece of land in said city which they may deem suitable (Laws of 1872, chap. 219, §§ 3, 4), is not violative of the provision of the Constitution which prohibits the taking of private property for public use without compensation (State Const., art. 1, § 7), as under it the commissioners may select lands owned by the city; and such lands can be taken for the purposes of the act, without any provision for compensation. *People ex rel.* v. *City of Rochester.* 525

12. The selection and procuring a site for the contemplated buildings are necessary steps toward the erection thereof, and are embraced in the subject expressed in the title of said act. *Id.*

13. The insertion of this provision, therefore, in the act does not render it repugnant to the constitutional provision prohibiting the passage of a local or private act embracing more than one subject, and that to be expressed in its title. (State Const., art. 3, § 16.) *Id.*

14. Every presumption is in favor of the validity of legislative acts, and they are to be upheld unless there is a substantial departure from the organic law. *The People ex rel.* v. *Briggs.* 553

15. In order to comply with that provision of the Constitution which declares that "no local or private bill which may be passed shall embrace more than one subject, and that shall be expressed in the title" (State Con., art. 3, § 16), it is not requisite that the most expressive title shall be adopted, nor will courts criticise too rigidly the details of a bill to find extraneous matter. The degree of particularity with which the title of an act is to express its subject, rests in the discretion of the legislature. *Id.*

16. Where the title of a local or private act expresses a general purpose or object, all matters fairly and reasonably connected with it, and all measures which will or may facilitate its accomplishment, are proper to be incorporated in the act, and are germane to the title. *Id.*

17. Where a local or private act embraces more than one subject, one of which is properly expressed in the title, all of the provisions of the act relating to the subject, not thus expressed, are invalid and will be rejected. But if the provisions relating to the subject expressed are in no way connected with or dependent upon the others, and if by striking out those others the residue of the act is complete in itself, sensible and capable of being executed, the act, with the void provisions eliminated, is valid and will be upheld. (GROVER, FOLGER and PECKHAM, JJ., dissenting.) *Id.*

18. It is unnecessary that a law, in order to operate as an amendment to a municipal corporation, should

specify that it is an amendment to the charter or to any specific act. It is sufficient if the provisions affect the corporation in its governmental capacity. *Id.*

19. The words, "the city of Rochester," in the title to the act entitled "An act to amend the several acts in relation to the city of Rochester" (Laws of 1872, chap. 771), signify the corporation of the city; the title expresses a subject, and that one comprehensive enough to embrace all the details of the city charter and government. *Id.*

20. The provisions of the twentieth section of said act, which confirms the proceedings of the common council and authorizes a city railroad to lay its tracks upon the sides instead of the center of an avenue, are connected with the regulation of the streets of the city and are embraced in the subject expressed in the title, as are also the provisions of the twenty-fifth section conferring upon the water commissioners authority to contract with the trustees of the villages, through which the water to the city may be conducted, to supply the villages with water, and authorizing such trustees to levy the annual expense with their annual tax. The power to supply villages by contract is incidental to the main purpose of furnishing the city with water, and may serve as the means of attaining it; and the authority conferred upon the trustees to levy the tax is indispensable to render such a contract effectual. (CHURCH, Ch. J., ALLEN and ANDREWS, JJ., concurring.) *Id.*

21. The sections of said act, also, which are not specified as amendments in the act itself, are valid, and effectual as if thus specified. *Id.*

See APPEAL, 13, 14.
NATIONAL BANKS, 2, 3.
PLANK-ROAD CORPORATIONS, 3.

CONSTRUCTIVE NOTICE.

1. Notice to a purchaser of property of the existence of liens or encumbrances thereon is sufficient, in the absence of explanation, to charge him with notice of any and all liens or encumbrances which an inquiry would have disclosed. It is not necessary in such a case to show actual notice of the particular instrument creating a lien to deprive him of the character of a *bona fide* purchaser. *Reed* v. *Gannon.* 845

2. By articles of separation between a husband and wife, certain chattels were conveyed to a trustee for the benefit of the wife, and were accepted in full satisfaction for her support and maintenance, on condition that all mortgages, etc., thereon should be discharged by the husband in ninety days, which he covenanted to do. The instrument declared that the wife did not admit the validity, as against herself, of any outstanding mortgage, etc., and that the husband did not assume any liability beyond the amount of existing liens. At the time of the execution of the instrument a chattel mortgage existed upon the property, which was not filed, and was unknown to the wife or trustee. No inquiry was made by them as to encumbrances. *Held* (PECKHAM, J., dissenting), that the language of the instrument implied the existence of mortgages, and was sufficient to put them upon inquiry, and that they were chargeable with notice of the existence of the mortgage in question. *Id.*

CONTRACTS.

1. S. sold to H. & A. S. & Co. a stock of goods. It was agreed verbally that S. should have a one-third interest in the proceeds of sale in excess of $275,000. This interest he offered to sell for $20,000 to K., who agreed to purchase. No money was paid by K., and no evidence of the interest of S. was received by him. The only memoranda made in writing were contained in two letters, both directed and delivered to H. & A. S. & Co.; one, signed by K., directing that firm to credit S.

with $20,000 and charge the same to him, and stating that in consideration thereof S. would authorize them to transfer to his (K.'s) credit all the interest of S. in the proceeds; the other, signed by S., directing them to transfer all his interest to K., in accordance with K.'s letter (which was inclosed), and, in consideration thereof, directing them to credit his account $20,000 to the debit of K. H. & A. S. & Co. were not indebted to K., and had no property or securities of his in their hands. They had agreed to loan him the money and credit it to S.; of this it did not appear S. had any knowledge. One of the firm verbally acknowledged the receipt of the letters, and stated the assent of his firm to the agreement. H. & A. S. & Co. were the bankers of S., which was known to K. They did not credit S. with the $20,000. Two days after the letters were written, S. repudiated the arrangement, and demanded back the papers. Some days subsequently, by contract in writing, H. & A. S. & Co. agreed to pay to S. one-third of the proceeds of sale over $275,000. Nothing was ever done by K. or H. & A. S. & Co. toward paying S. for his interest. The goods were subsequently sold, and the interest of S. ascertained to be over $100,000. In an action by K. to recover this interest,—*Held*, that the only legal evidence of the agreement between S. & K. was that embodied in the letters; that neither the prior negotiations between them, nor the arrangement between K. and H. & A. S. & Co., could be resorted to, to modify or explain these letters. *Von Keller* v. *Schulting*. 108

2. Also *held* (RAPALLO, J., dissenting), that the signing and delivery of the letters did not transfer the interest of S., if any existed at the time; that the giving him credit in his account upon the books of the firm for the $20,000 was a condition precedent to such transfer, and no such credit having been given, it was not transferred. But, further, that S. had no interest or valid claim against H. & A. S. & Co. at the time the letters were written, and that he was not estopped from raising the question, inasmuch as K. never advanced anything or incurred any liability upon the faith that there was such an interest. *Id.*

3. Where one enters into a contract to furnish materials and perform work of a specified character, to be paid for upon performance, although materials may be furnished and the work performed, yet if not done in the manner stipulated, no action will lie for the compensation; a substantial performance must be shown, unless it has been waived or released. The right to recover will not be forfeited, however, by reason of technical, inadvertent or unimportant omissions or defects; whether the defects are substantial, or technical and unimportant, is a question of fact. *Glacius* v. *Black*. 145

4. Where, by the terms of a contract for the repair of a building, it is stipulated that the materials shall be of the best quality and the work performed in the best manner, subject to the acceptance or rejection of an architect, all to be done in strict accordance with the plans and specifications, and to be paid for when done completely and accepted, the acceptance by the architect of a different class of work or of inferior materials, will not bind the owner, and does not relieve the contractor from the agreement to perform according to the plans and specifications. The provision for acceptance is an additional safeguard against defects not discernible by an unskillful person. *Id.*

5. By an agreement between the parties, upon the completion of a contemplated enlargement of plaintiff's canal, defendant covenanted to pay additional toll, the amount of which was to be arrived at by ascertaining or estimating the cost of transportation before the enlargement, and also such cost after the enlargement, and one-half of such portion of the reduction as should be estimated

to have been produced solely by the enlargement should be the additional toll thereafter to be charged; and in cases of disagreement between the parties as to the amount of reduction, and the portion thereof produced by the enlargement, the same should be determined by arbitrators. In an action to recover additional toll, and to fix the amount thereafter to be charged,—*Held*, 1st. That the right of plaintiff to demand and the obligation of defendant to pay additional toll was restricted to the rate to be established pursuant to the agreement, and, until thus ascertained and established, defendant could not be put in default and plaintiff had no cause of action. 2d. That to found a claim for additional toll it must be made to appear that the actual cost of transportation was reduced after enlargement, and as the cost before and after was capable of being and was of such a character that it was essential it should be certainly ascertained, not conjectured, the contract required it should be so ascertained, from the best and most reliable data, and not determined by the judgments or opinions of parties or arbitrators without such data; also that the words "actual cost," meant the actual expenditure or outlay by the companies in the transportation of coal, as the business had been ordinarily conducted by them. *Prest., etc., D. & H. Canal Co.* v. *Penn. Coal Co.* 250

6. Where a contract for the sale of lands contains restrictions respecting the use to which the premises are to be applied by the vendee, the vendor has the right to insert in the deed tendered in performance of the contract suitable provisions either in the form of a condition or a covenant to preserve and effectuate these provisions of the contract. If he inserts them in the form of a covenant and the grantee is entitled to a change in the form, or if he has the right to elect that a condition be substituted for a covenant, it is his duty to make his election or to provide the modification required before he can rescind the contract and sue to recover back the purchase-money paid. A mere general objection and refusal to accept the deed tendered is insufficient. (CHURCH, Ch. J., and PECKHAM, J., dissenting.) *Congregation S. H. M.* v. *Halladay* (Mem.). 664

See COMMON CARRIERS, 1, 5.
DAMAGES, 1.
HUSBAND AND WIFE, 5.
INSURANCE (FIRE), 1, 2, 5, 6.
INSURANCE (LIFE), 1, 2, 4, 5.
PRINCIPAL AND AGENT, 1, 2, 8.
PRINCIPAL AND SURETY, 2.
RESCISSION.
VENDOR AND VENDEE.
Killip v. *Metzen* (Mem.), 658.
Budd v. *Sinclair* (Mem.), 663.
Johnson v. *De Peyster* (Mem.), 666.
Whilin v. *Pendegast* (Mem.), 674.
Collins v. *Hall* (Mem.), 687.
Oulver v. *W. U. T. Co.* (Mem.), 691.
Rowley v. *Woodruff* (Mem.), 700.

CONTRIBUTION.

See FORECLOSURE, 4.

CONVERSION.

The firm of C. & S. were liable as principals upon certain drafts held by M. C. Defendant was liable thereon as surety. M. C. brought suit upon the draft against all the parties thereto. S., who had assumed the liability of the firm of C. & S., entered into a contract with defendant by which defendant was to provide for and take up the drafts in the first instance, but S. was eventually to pay them and save defendant harmless therefrom. Before the making of this agreement plaintiff had promised to indorse the notes of S. for the purpose of settling the suit. He was fully apprised of the agreement. Defendant paid the drafts and settled the suit. Plaintiff, in ignorance of that fact, indorsed the notes of S., payable to the order of M. C., and delivered them to defendant for the purpose of taking up the drafts. Defendant procured

the indorsement of M. C. thereto and transferred them to a *bona fide* purchaser. In an action for the conversion of the notes,—*Held*, that as the purpose for which plaintiff indorsed and delivered the notes to defendant was not accomplished by them, the latter acquired no title to them; that he had no right to use them as security for what he had before paid for S., and was therefore liable. *Develin* v. *Coleman*. 531

See DAMAGES, 4.
ELECTION OF REMEDIES, 1.
NEGLIGENCE, 1.
STOCKBROKERS.

CORPORATIONS.

See EVIDENCE, 7.
FERRY COMPANIES.
FOREIGN CORPORATIONS.
INSURANCE (FIRE).
INSURANCE (LIFE).
MANUFACTURING CORPORATIONS.
PLANK-ROAD CORPORATIONS.
N. E. Co. v. *McNamara* (Mem.), 653.

COSTS.

1. No judgment can be entered upon a remittitur of an order of this court reversing an interlocutory order of the Supreme Court, nor can the costs of the appeal be adjusted by the clerk. The proceedings are interlocutory, and costs are to be adjusted and collected as other interlocutory costs are collected. *Brown* v. *Leigh*. 427

2. Upon motion to set aside a judgment for costs entered upon such a remittitur, the court may make a proper order for the recovery of the costs; but its refusal so to do does not affect a substantial right, and is not appealable. *Id.*

3. Appeals to this court from orders are not within the exceptions of subdivision 5 of section 307 of the Code. But where costs are given the successful party is entitled to full costs. (Code, § 307, sub. 6.) *Id.*

4. Where, upon appeal to this court from an order granting a new trial in an equity case, the order is affirmed and judgment absolute ordered against appellant "without costs to either party," this disposes of all the costs in the action, and an insertion by respondent of costs in the judgment entered upon the remittitur is irregular. *Patten* v. *Stitt*. 591

5. A motion to correct the judgment is the proper remedy. Whether an appeal from the judgment is proper in such case, *quere*. *Id.*

6. A judgment should not be set aside on account of an improper taxation of costs, or a taxation without notice. A readjustment should be ordered, and the amount of reduction, if any, be deducted from the judgment. *Watson* v. *Gardiner* (Mem.). 671

7. Where two causes of action are set forth in the complaint, and the defendant succeeds in his defence to one of them, but a judgment is obtained against him upon the other, he is not entitled to costs for the successful defence. *Id.*

8. Where, in a case tried by a referee, there is no stipulation as to referee fees, it is incumbent upon the party succeeding to show, affirmatively, that the referee was personally present, engaged in the reference, for days enough to make, at the rate of three dollars per day, the sum charged in the bill of costs. *Id.*

9. An allowance of ten dollars motion costs, to abide the event in an order granting a reference, is proper. *Id.*

See APPEALS, 20.
ATTACHMENTS, 8.
Debbe v. *Debbe* (Mem.), 695.

COUNSEL FEES.

See INJUNCTION, 3, 4.

COUNTER-CLAIM.

See ELECTION OF REMEDIES, 1.

COURT OF APPEALS.

See APPEALS.
WRIT OF ERROR.

COURTS-MARTIAL.

1. The fact that courts-martial were authorized by statute prior to or soon after the adoption of the first Constitution of this State; that when the subsequent Constitutions were framed these tribunals thus authorized were in the open and continued exercise of their authority; that when in either of the Constitutions existing courts were abolished or modified, it was done by express provision, and that there is no provision in terms modifying or abolishing courts-martial, are evidence that no such abolition was intended. The fact, therefore, that they are not included in the courts authorized to be established by the legislature by the provisions of the new judiciary article adopted in 1869 (Const., art. 6, § 19) does not by implication prohibit their establishment. Courts-martial are also necessary incidents to the "discipline" of the State militia and the provision of the Constitution requiring the militia to be "armed and disciplined" (art. 11, § 1); also the provision that no person shall be held to answer for a capital or otherwise infamous crime except on indictment, except in cases of the militia, etc. (art. 1, § 6), recognize their existence. They are, therefore, constitutional. *People ex rel.* v. *Daniell.* 274

2. The legislature has the power to direct the enforcement of valid judgments by imprisonment, in case property cannot be found. The provision, therefore, of the Military Code of 1870 (§ 214, chap. 81, Laws of 1870), authorizing the arrest of a delinquent in case sufficient goods and chattels cannot be found to satisfy a fine or penalty imposed by court-martial, is constitutional. *Id.*

COVENANT.

See VENDOR AND VENDEE, 4.

CREDITORS' SUIT.

See ATTACHMENTS, 4.
Erickson v. *Quinn* (Mem.), 697.

CRIMINAL TRIAL.

1. The prohibition of the Constitution of the State against compelling an accused person to be a witness against himself (Const., art. 1, § 6) may be waived by him, and is waived by his consenting to be a witness in his own behalf under the act of 1869, in relation to evidence in criminal prosecutions (chap. 678, Laws of 1869), and he thereby subjects himself to the same rules and tests applicable to other witnesses. *Connors* v. *The People.* 240

2. If the facts proved upon a criminal trial are capable of two constructions, or if, in one view of the evidence, a particular intent may be found, and yet the facts may justify the finding of an intent involving another degree of guilt, the court is bound, upon the request of the prisoner, to declare the rule of law applicable to the case in either aspect. *Foster* v. *The People.* 598

See EVIDENCE, 4, 5.
MURDER, 2.
TRIAL, 3, 4.

CUSTOM.

See USAGE.
Johnson v. *De Peyster* (Mem.), 666.

DAMAGES.

1. The rule of damages in cases of marine trespass (*i. e.*, the precise cost or value of the article at the time of the loss, with interest) is not applicable to the case of the violation of a contract entered into for the express purpose of procuring goods for sale at their place of destination. A loss of profits, the direct consequence of the breach, if within the contemplation of the parties at the time of making the contract, and if not speculative or contingent, may be recovered. (RAPALLO, J.) *Heinemann* v. *Heard*. 27

2. Where one, with intent to cheat and defraud another, induces him by fraudulent means and representations to purchase stocks for value which he knows to be worthless, he is liable for the damages sustained, whether the purchase is made from him or another. *Hubbell* v. *Meigs*. 480

3. The measure of damages in such case is the difference in value of the stock, as the condition of the company issuing it really was, and as the purchaser was fraudulently induced to believe it was. The market price of the stock about the time or soon after the purchase, is strong evidence of its value, and in the absence of other proof will control. But where the real pecuniary condition of the company is shown, from which it appears the stocks were worthless, such market price is entitled to no weight upon the question of value. The purchaser, after discovery of its worthlessness, is not bound to mitigate the loss of him by whose fraud he was induced to purchase, by himself cheating some ignorant purchaser. *Id.*

4. In an action for the unlawful taking and conversion of a quantity of household furniture, including carpets, etc., upon the question of damages as to the carpets, the court charged that the rule was, "what would be the value to a party if he wanted to get the same articles again." *Held*, no error; that it was proper to include not only their worth in market, but also the value of the labor in cutting, making and putting down. *Starkey* v. *Kelly*, (Mem.) 676

See INJUNCTION, 1, 2, 3, 4, 5.
Campbell v. *Page* (Mem.), 658.

DEBTOR AND CREDITOR.

See ATTACHMENTS, 4.

DEED.

See PLANK-ROAD CORPORATIONS, 1, 2.
VENDOR AND VENDEE, 4.
Wallace v. *Fee* (Mem.), 694.

DEFENCES

See JOINT DEFENDANTS, 2.
MUNICIPAL CORPORATIONS, 2.

DEMAND.

Defendant was sued as indorser upon a note containing a statement that the maker had deposited with the payee certain collaterals with authority to the latter to sell, without notice in case of non-payment; these collaterals came to plaintiff's hands when it became holder of the note. When payment of the note was demanded of the maker he demanded of the notary presenting it a return of the collaterals, stating his readiness and willingness to pay upon production thereof; the notary did not have them. *Held*, that the demand and refusal were insufficient to charge the indorser; that to constitute a valid demand the collaterals should have been produced, or had in readiness to be surrendered upon payment. *O. Nat. Bank* v. *Fant*. 474

DEMURRER.

See APPEAL, 1, 23.
CAUSE OF ACTION, 6.
INSURANCE (LIFE), 4.

DEPOSITIONS.

See COMMISSIONS.

DIVORCE.

See ALIMONY.

DOWER.

1. A statutory foreclosure and sale under a power of sale contained in a purchase-money mortgage, bars the right of dower of the wife of the mortgagor, who was not a party to the mortgage. *Brackett* v. *Baum.* 8

2. Although she does not derive title from her husband, yet she claims under him within the intent of the provisions of the Revised Statutes regulating mortgage sales under powers. (2 R. S., 745, § 8, as amended by the act of 1840, § 12, chapter 342, Laws of 1840.) It is only by virtue of his seizin that she can claim, and her inchoate right is subject to any claim to which the title he acquired was subject. It is subordinate to a purchase-money mortgage, and subsequent to it in the order of priority: and where it ripens into actual title, upon the death of her husband, it is subsequent in point of time. *Id.*

3. Where a husband is seized of a vested remainder expectant upon an estate for life, subject to be defeated by his own death prior to that of the tenant for life, and he purchases the life estate, this is such a seizin as gives the wife dower subject to be defeated, as above. The husband cannot alienate or incumber the estate to the prejudice of the wife's dower, nor is the same affected by the sale of the life estate upon execution against the husband. *House* v. *Jackson.* 161

See FORECLOSURE, 4.

EASEMENTS.

1. The owners of property adjoining a street in the city of New York, laid out under the act of 1813, have an easement in the street, in common with the whole people, to pass and repass, and also to have free access to their premises; but the mere inconvenience of such access occasioned by the lawful use of the street by a railroad is not the subject of an action. *Kellinger* v. *Forty-second Street and Grand Street Ferry Railroad Company.* 206

2. Adjoining proprietors have each an easement in the land of the other covered by a party wall, and the title of each owner is qualified by the easement to which the other is entitled. This easement includes the right to increase the height of the wall, provided such increase can be made without detriment to the strength of the wall, or to the property of the adjacent owner. The party making the addition, however, does it at his peril; he must insure the safety of the work, and if injury results he is liable. *Brooks* v. *Curtis.* 639

3. S., owning two adjoining lots, erected a house on each, with a party wall between them. He conveyed one lot to plaintiff's and one to defendant's grantor, by deeds recorded the same day. The description in the former deed conveyed the party wall and two inches beyond. Plaintiff brought action to recover possession of the strip from the center of the party wall to the boundary line. *Held*, that plaintiff's premises were charged with a servitude of having the wall stand as an exterior wall to defendant's house and as a support to its beams so long at least as the bulidings should endure; that the right to use the party wall necessarily carried with it the right to occupy the two-inch space

with the timbers which were to find support in the wall, and to have the buildings and wall remain as they were at the time of the conveyances from S., while they endure; that actual possession, therefore, could not be given to plaintiff. *Rogers* v. *Sinsheimer*. 646

4. As to whether an action of ejectment would lie in such case, *quere*. At least all plaintiff could recover would be the fee, subject to the ejectment. *Id.*

See Wallace v. *Fee* (Mem.), 694.

ECCLESIASTICAL LAWS.

See JURISDICTION, 1.

ELECTION OF REMEDIES.

Where an agent converts property of his principal in his hands, and which he has agreed to account for and pay over, the principal has his election to sue for the breach of the contract or for the conversion; and if he elects to proceed for a breach of the contract, he may interpose it as a counter-claim in an action upon contract brought against him by the agent. *Coit* v. *Stewart*. 17

ELECTIONS.

1. A minority of the whole body of qualified electors may elect to an office where the majority decline to vote, or where they vote for one who is ineligible to the office, knowing of the disqualification. Notice of the disqualifying fact, and of its legal effect, may be given so directly to the voter as to charge him with actual knowledge of the disqualification; or the disqualifying fact may be so patent or notorious as that his knowledge of the ineligibility may be presumed as matter of law. But not only the fact which disqualifies, but also the rule or enactment of law which makes it thus effectual, must be brought home so clearly to the knowledge or notice of the elector as that to give his vote therewith indicates an intent to waste it in order to render his vote a nullity. *People ex rel.* v. *Clute*. 451

2. Where a majority of the electors, through ignorance of the law or the fact, vote for one ineligible to the office, the votes are not nullities; but while they fail to elect, the office cannot be given to the qualified person having the next highest number of votes. The election is a failure, and a new election must be had. (The rule stated which should govern in such case.) *Id.*

EJECTMENTS.

See EASEMENTS, 4.
USURY, 5.

EMINENT DOMAIN.

See INFANTS, 1, 2.

EQUITABLE ASSETS.

See ATTACHMENTS, 2, 3, 6.

EQUITY.

Where an owner has permitted his right to satisfy a mortgage to remain dormant for nearly thirty years, during which time others have paid the assessments and taxes and made improvements, in the belief that they had title under a foreclosure of the mortgage, equity will require, as a condition of his regaining possession, the payment of such assessments and taxes and for such improvements, in addition to the amount of the mortgage. *Miner* v. *Beekman*. 337

See LIMITATION OF ACTIONS, 3, 4, 6, 7.

ERROR (WRIT OF).

See WRIT OF ERROR

ESTOPPEL.

1. Where a will gives to the executor no authority to sell the testator's real estate or control over it, but with the knowledge of the heirs he applies to the court and obtains an order authorizing him to sell, and with the consent and at the request of the heirs he does negotiate a sale, receives the purchase-money and conveys by deed, the heirs also informing the purchaser that the executor is the authorized agent to make the sale, the purchaser has a right, without further inquiry, to rely upon the truth of such assurances, and the heirs are estopped from disputing them or thereafter asserting title to the land conveyed upon the ground of want of authority in the executor. *Favill* v. *Roberts*. 222

2. When a forged certification of a check is presented, at the bank upon which the check is drawn, to the teller whose certificate it purports to be, and he pronounces it genuine, he adopts the certification, and the bank is bound by it the same as if it was genuine. *C. Nat. Bank* v. *Nat. Bank of C.* 575

3. It is not necessary to an equitable estoppel that the party should intend willfully to mislead; but whatever may be the intent, if he make such a representation as a sensible man would take to be true, and believe that it was meant that he should act upon it, and he does so act, the party making the representation is precluded from contesting its truth. *Id.*

4. So, also, it is not necessary that a party should act affirmatively upon a declaration to claim an estoppel. If he has rested not in reliance upon it, but has means in his power to retrieve his position, and relying upon the statement and in consequence of it, he refrains from using these means, his claim will be upheld. *Id.*

5. The arrest and detention of a swindler are powerful means in coercing restoration of property he has unlawfully obtained, and the loss of these means in consequence of a reliance upon the declarations of another estops that other from denying the truth of the declarations. (RAPALLO, J., dissenting.) *Id.*

6. C. & Co. delivered to R. certain gold checks and certificates, receiving therefor R.'s check upon plaintiff's bank, purporting to be certified by its teller. C. & Co. immediately sent a messenger with the check to plaintiff's bank, who handed it to the teller, asking if it was all right. The teller replied that it was. The messenger immediately returned and reported this to C. & Co. The certification was in fact forged. Relying upon the declaration of the teller, C. & Co. refrained from taking such measures as might and probably would have stopped the payment of the gold checks, or a portion of them. C. & Co. deposited the check with defendant. Plaintiff brought suit to recover back the money paid thereon. Upon the trial the judge, after charging, in substance, that if C. (one of the firm of C. & Co.) had done all that could be done on his part at the time of making the declaration, and had put himself in such a position that the declaration could not affect his action, then the principle of estoppel would not apply, charged as follows: "The delivery of these gold checks on the part of Mr. C., it is insisted upon, is in law a delivery of the gold. I think it was not." *Held*, that although the charge, if construed as a statement of law applicable to all cases, might be technically inaccurate, yet, as used, it simply conveyed the idea that there was not such a delivery as prevented the interception of the checks and stoppage of payment, and so considered it did not mislead the jury, and was not error. Also *held*, that plaintiff was estopped by the declaration of its teller from questioning the genuineness of the certification. *Id.*

7. The declaration of A. to B., not made with the purpose or belief

that it would be communicated to C. or would influence his action, constitutes no estoppel upon A., although C. afterward hear of it and acts upon it. *Mayenbory* v. *Haynes* (Mem.). 675

See CONTRACT, 2.
PARTNERSHIP, 1

EVIDENCE.

1. In an action against a vendor to recover back a payment made upon an executory contract for the sale of land, an abstract of title of the land agreed to be conveyed, furnished by him to the vendee, to aid in making a search, is competent evidence against the defendant as showing his claim of title, and this followed by proper evidence, showing that the title thus claimed is defective, makes out a *prima facie* case, putting defendant to proof of any other and better title, if any he has. *Hartley* v. *James*. 88

2. The trustees of a manufacturing corporation organized under the act to authorize the formation of corporations for manufacturing and other purposes (chapter 40, Laws of 1848), are neither parties nor privies to a judgment against the company; and where, in consequence of a failure to make and file an annual report as required by section 12 of that act, they have become liable to pay the debts of the company, and an action is brought against them to enforce that liability and collect a debt due from the company, proof of the recovery of such a judgment thereon is neither conclusive nor *prima facie* evidence of the debt. *Miller* v. *White*. 187

3. Where the evidence of a witness is sought to be impeached by written statements alleged to have been made by him, the writing should be produced to the witness for inspection and examination, and questions as to the contents are not ordinarily admissible. *Gaffney* v. *The People*. 416

4. Upon the trial of an indictment for murder, one C. was examined as a witness for the prisoner, and gave material testimony. Upon cross-examination he testified that on the day of the homicide he made a statement in writing, signed it with his mark, and swore to it. Various questions were then asked him with intent to show that he had made statements in conflict with his testimony. These questions were not objected to. Witness denied the making of such statements. The written statement was produced to the witness, and was also identified by the officer to whom it was made. It contained statements in conflict with C.'s evidence, and substantially as stated in the questions put to the witness. After the prisoner's counsel rested, this statement was offered in evidence by the prosecution. It was objected to as incompetent. *Held*, that the objection was properly overruled; that if any part of the statement was objectionable as not relating to inquiries which had been made of the witness, that objection should have been specifically taken. *Id.*

5. The counsel for prisoner, on his examination of C., showed by him that the written statement was made while he was under arrest, and that he supposed he would be discharged upon signing it. The prosecution then called the officer under whose direction the statement was made, and asked him if he held out any inducement or used any compulsion to induce C. to make and sign it. To this question the prisoner's counsel objected, and objection was overruled. *Held*, no error. *Id.*

6. Although the intent is essential to constitute the offence of usury, the intent must be deduced from, and determined by the facts. The knowledge and voluntarily taking or reserving a greater interest or compensation for a loan than that allowed by law is *per se* usurious. The offence is not condoned by want of intent to violate the statute or by giving to the transaction another name than that of a loan

Accordingly, *held*, that evidence of plaintiff as to his intent to take more than seven per cent per annum for a loan was properly excluded. *Fiedler* v. *Darrin*. 487

7. As between stockholders, the books of a corporation and sworn copies thereof are competent evidence to show the acts of the corporation. *Hubbell* v. *Meigs*. 480

See COMMON CARRIERS, 1.
CONTRACTS, 1.
EVIDENCE, 2.
TRIAL, 4.
Hincken v. *M. B. Life Ins. Co.*, (Mem.), 657.
Budd v. *Sinclair* (Mem.), 663.

EXECUTION.

See DOWER, 3.
Erickson v. *Quinn* (Mem.), 697.

EXECUTORS AND ADMINISTRATORS.

See APPARENT OWNER, 2.
CAUSE OF ACTION, 8.
FORECLOSURE, 4.
LIMITATION OF ACTIONS, 8, 9.
WILLS, 8.

FERRY COMPANIES.

1. It is the duty of a ferry company not only to carry its passengers safely, but not to injure them by any act of carelessness or negligence. It is negligence for its employes to order teams to pass off its boat before the bridge, prepared for that purpose, is properly adjusted. *Haeman* v. *H. L. & I. Co.* 53

2. Plaintiff was passing on to one of defendant's ferry boats. In consequence of the crowd moving off the boat he was obliged to step upon the stringer, separating the passage from the carriageway. Plaintiff's witnesses testified that before the bridge was adjusted to the level of the boat, and while it was some eight or nine inches above it, defendant's employes dropped the chain and ordered the teams to pass off. A horse, attached to a heavily laden cart, in attempting to do so, struck his foot against the bridge and fell; the shaft of the cart struck plaintiff and broke his leg. The jury found a verdict for plaintiff. *Held*, that ordering the teams from the boat before the bridge was properly adjusted was a negligent act, likely to produce the result which followed to the horse; that it was not negligence, as matter of law, for the plaintiff to be going upon the boat, according to the usual custom, before those disembarking had all passed off, nor, under the circumstances, to be standing upon the stringer; and that the evidence was, therefore, sufficient to go to the jury and to sustain their finding. *Id.*

FINDINGS OF FACT AND LAW.

A general finding of a referee, like a general verdict, is controlled by a special finding of fact. *Phelps* v. *Vischer*. 69

See *Morgan* v. *Mulligan* (Mem.), 665.
Whitin v. *Pendegast* (Mem.), 674.

FORECLOSURE.

1. A statutory foreclosure and sale under a power of sale contained in a purchase-money mortgage, bars the right of dower of the wife of the mortgagor, who was not a party to the mortgage. *Brackett* v. *Baum*. 8

2. Although she does not derive title from her husband, yet she claims under him within the intent of the provisions of the Revised Statutes regulating mortgage sales under powers. (2 R. S., 745, § 8, as amended by the act of 1840, § 12, chap. 342, Laws of 1840.) It is only by virtue of his seizin that she can claim, and her inchoate right is subject to any claim to which the title he acquired was

subject. It is subordinate to a purchase-money mortgage, and subsequent to it in the order of priority; and where it ripens into an actual title, upon the death of her husband, it is subsequent in point of time. *Id.*

3. Plaintiff was the owner of a mortgage covering a farm, which was subsequent to the execution of the mortgage sold to B.; B. executed a mortgage thereon to Q. for $1,200. He then sold seventy-seven acres thereof to C. He conveyed the residue, excepting twenty acres, to H. S., subject to plaintiff's mortgage and another, both of which H. S. agreed to pay. H. S. gave back a mortgage to secure $3,500 of the purchase-money, containing a proviso that no part of the sum secured should become due or payable until all liens and incumbrances not assumed by the mortgagor should be paid and discharged of record. The twenty acres excepted were upon the same day conveyed by B. to E. S. This deed was made subject to the same mortgages referred to in the deed to H. S. Q. foreclosed his mortgage by action. Plaintiff was not made a party Under the judgment therein the portion conveyed to H. S. was sold, subject to all incumbrances prior to Q.'s mortgage; the purchaser assigned his bid to M., who received the sheriff's deed. In an action to foreclose plaintiff's mortgage, M. claimed that the twenty acres sold to E. S. should be sold first, upon the ground that Q.'s mortgage was *pro tanto* an alienation of the property; that he, as purchaser, acquired the rights of the mortgagee, and that the conveyance under the foreclosure of that mortgage related back to the date of the mortgage and was to be regarded as a conveyance prior to that of E. S. *Held*, that in the absence of proof to the contrary, it must be presumed that the sale upon the foreclosure of Q.'s mortgage was conducted in accordance with the judgment directing it, and that such judgment directed the lands conveyed to H. S. to be first sold; that they were, in equity, liable to be so sold, as H. S. had in his hand an amount of the purchase-money sufficient to pay that mortgage; that they were also primarily liable for the payment of plaintiff's mortgage, and when they were sold, subject to this incumbrance, the inference is they were sold subject to the entire burden thereof; and that therefore the judgment herein should direct that such lands, now the lands of M., be first sold. *Hart* v. *Wandle*. 381

4. G., the husband of plaintiff, in his lifetime executed a mortgage upon two lots of land, in which plaintiff joined. Subsequent to his death, plaintiff, as his administratrix, executed another mortgage thereon, pursuant to a decree of the surrogate, made upon the ground that the personal property was insufficient to pay the debts. Defendant, L., as grantee of the heir of G., had notice of the application to the surrogate, and appeared thereon. Plaintiff's dower in the two lots was admeasured to her in one of them. L. sold the lots to D., subject to the mortgages and the dower as admeasured, and D. sold the lot, no part of which was assigned for dower, to S., who assumed the mortgages and agreed to pay them. Plaintiff subsequently became owner of both mortgages. In an action to foreclose them,—*Held*, 1st. That defendant, L., was concluded by the decree of the surrogate as to amount of assets in plaintiff's hands as administratrix and the amount of deficiency, and that an offer to prove that plaintiff's resources for purchasing the mortgages came from moneys belonging to the estate was properly overruled. 2d. That plaintiff was liable to contribute toward the payment of the first mortgage to the extent of the interest upon one-third of the principal during her life; that S. was liable for the payment of the entire amount, and that defendant, L., was entitled to receive what the plaintiff was liable to pay. *Graham* v. *Linden*. 547

FOREIGN CORPORATIONS.

A foreign railway corporation cannot claim the benefit of the statute of limitations of this State in an action of which the courts of this State have jurisdiction, although it has before the commencement of the action for the time specified in the statute continuously operated and carried on a railroad in this State, having a large amount of property for all that time within the State, and having a managing agent resident therein. *Rathbun* v. *N. C. R. Co.* (Mem.), 656

See ATTACHMENTS, 6.

FOREIGN JUDGMENTS.

See FORMER ADJUDICATION, 2.

FORGERY.

See ESTOPPEL, 2, 6.

FORMER ADJUDICATION.

1. Upon an application made to the Supreme Court under the provisions of the act of 1840 (chap. 384, Laws of 1840), to prove an exemplified copy of a foreign will, an order was made adjudging that the instrument so offered was not the last will and testament of the deceased, and denying the application, which order was made upon the ground that the case was not brought within that statute. In proceedings before a surrogate for the probate of the will itself,—*Held*, that such order was no bar. *In re Dive.* 88

2. A judgment of a court of another State is only conclusive upon the parties where it is a definitive judgment upon the same cause of action upon the merits. An interlocutory order upon a special application pending the suit, is not conclusive upon a similar application in an action in this State. *Brinkley* v. *Brinkley.* 184

See FORECLOSURE, 4.

FRAUD.

1. Fraud is not established by proving the falsity of statements which were simply expressions of opinion and belief founded upon information derived from others. The party alleging fraud must show, in addition, that he who made the statements knew them to be false at the time of making them. *Hubbell* v. *Meigs.* 480

2. Where one, with intent to cheat and defraud another, induces him by fraudulent means and representations to purchase stocks for value which he knows to be worthless, he is liable for the damages sustained, whether the purchase is made from him or another. *Id.*

3. The measure of damages in such case is the difference in value of the stock, as the condition of the company issuing it really was, and as the purchaser was fraudulently induced to believe it was. The market price of the stock, about the time or soon after the purchase, is strong evidence of its value, and in the absence of other proof will control. But where the real pecuniary condition of the company is shown, from which it appears the stocks were worthless, such market price is entitled to no weight upon the question of value. The purchaser, after discovery of its worthlessness, is not bound to mitigate the loss of him by whose fraud he was induced to purchase, by himself cheating some ignorant purchaser. *Id.*

4. The rule that he who seeks to rescind an agreement upon the ground of fraud, must place the other party in as good a situation as that in which he was when the agreement was made, is satisfied if the judgment asked for will accomplish that result, and in such a case no offer to return that which was received is necessary. *Allerton* v. *Allerton* (Mem.). 670

5. Accordingly, *held*, that where plaintiffs were induced by the fraudulent representations of defendant, their partner, to sell out their interest in the partnership

property for a sum paid in cash, and where the complaint alleged and it appeared that defendant had received more than the amount paid out of the avails of the property, and the judgment asked for was that defendant account for the moneys received and pay over the surplus after deducting the sum paid, that it was not necessary to allege or show an offer to return the money received on the sale. *Id.*

See Fitzhugh v. *Sackett* (Mem.), 699.

FRAUDULENT CONVEYANCES.

See CAUSE OF ACTION, 3.

FUGITIVES.

See CONSTITUTIONAL LAW, 3.

GENERAL TERM.

1. Where a judgment in an action tried by the court or a referee is reversed by the General Term and new trial ordered upon questions of fact, the General Term is not required to specify, in its order, the particular errors of fact to authorize a review in this court; it is sufficient if the order states generally that the reversal was based wholly, or in part, upon errors of fact. *Hubbell* v. *Meigs.* 480

2. The General Term has not only authority but it is its duty, where the facts established require it, to reverse a judgment as to one or more of several joint defendants, and affirm it as to others. *Id.*

GOVERNOR.

See CONSTITUTIONAL LAW, 3.
JUSTICE OF THE SUPREME COURT, 1.

GUARDIAN AND WARD.

See INFANTS, 1, 2.

HIGHWAYS.

The provision of the act of 1867 amending the act to prevent animals from running at large upon the highways (Laws of 1867, chap. 814, § 2), which gives a remedy for injuries by cattle trespassing, applies only to cattle trespassing upon premises from the highway; it has no application to the case of a trespass by the cattle of one gaining access through a division fence to the lands of an adjoining owner. *Jones* v. *Sheldon.* 477

See MUNICIPAL CORPORATIONS, 3.
NEGLIGENCE, 7.
Wallace v. *Fee* (Mem.), 694.

HUSBAND AND WIFE.

1. Where a husband is seized of a vested remainder expectant upon an estate for life, subject to be defeated by his own death prior to that of the tenant for life, and he purchases the life estate, this is such a seizin as gives the wife dower, subject to be defeated as above. The husband cannot alienate or encumber the estate to the prejudice of the wife's dower, nor is the same affected by the sale of the life estate upon execution against the husband. *House* v. *Jackson.* 161

2. By articles of separation between a husband and wife, certain chattels were conveyed to a trustee for the benefit of the wife, and were accepted in full satisfaction for her support and maintenance, on condition that all mortgages, etc., thereon should be discharged by the husband in ninety days, which he covenanted to do. The instrument declared that the wife did not admit the validity, as against herself, of any outstanding mortgage, etc., and that the husband did not assume any liability beyond the amount of existing liens. At the time of the execution of the instrument a chattel mortgage existed upon the property, which was not filed, and was unknown to the wife or trustee. No inquiry was made by them as to incum-

brances. *Held* (PECKHAM, J., dissenting), that the language of the instrument implied the existence of mortgages, and was sufficient to put them upon inquiry, and that they were chargeable with notice of the existence of the mortgage in question. *Reed* v. *Gannon*. 345

3. Also *held* (GROVER, J.), that the trustee was not a purchaser for value. *Id.*

4. It seems that where chattels are purchased by the husband as presents for the wife, and are notoriously recognized as her property, it does not follow from the fact that they are brought into the house jointly occupied by them (they being so brought in as her property) that they are in his possession or legally under his control, and in the absence of fraud her title will be good, even as against subsequent creditors of or purchasers from her husband. *Id.*

5. The fact that at the time of making an ante-nuptial contract the intended husband is indebted to a large amount does not, in the absence of fraud, invalidate the contract. *Starkey* v. *Kelley* (Mem.). 676

See DOWER.

IMPRISONMENT.

See COURTS-MARTIAL, 2.

INFANTS.

1. The provision of the third section of the act of 1833 (chap. 319, Laws of 1833), amending the act incorporating the (then) village of Brooklyn, which authorizes the taking of the residue of any lot upon the written consent of the owner, where a portion thereof is required for the opening of a street, etc., provides no way for divesting the title of infants to lands not required for the contemplated improvements. *Battell* v. *Burrill*. 13

2. Neither the general guardian nor the guardian *ad litem* of an infant has power to give consent, and the only mode of transferring his title to the city is by proceedings pursuant to the Revised Statutes for the sale of infants' estates. *Id.*

3. The service of summons by publication in an action for foreclosure under the provisions of subdivision 6 of section 135 of the Code, which provides for service upon unknown parties having an interest in the mortgaged premises, is valid and binding, although it appears that the unknown party is an infant. *Wheeler* v. *Scully* (Mem.). 667

INJUNCTIONS.

1. Where proceedings conducted by one party for his own benefit in the name of another are restrained by an injunction directed to the nominal party, the damages and expenses incurred by the real party in interest in procuring a discharge of the injunction will be presumed in law to have been incurred by the defendant on the record, and are recoverable in his name for the benefit of the real party in interest. *Andrews* v. *G. W. Co.* 282

2. On an assessment of damages upon an undertaking given upon the granting of a temporary injunction which restrained legal proceedings for the collection of a demand, it is not competent to go into the merits of the proceedings restrained, unless the party prosecuting the reference claims as damages for loss of his demand. *Id.*

8. Expenses properly incurred on the part of the defendant for the purpose of dissolving an injunction are legally allowable as damages, and when a motion has been made to dissolve the injunction, which was denied, not upon the merits or for irregularity, but because the court in its discretion thought it advisable to defer the inquiry into the merits until the final hearing, the expenses of the motion and also counsel fees upon the trial are proper items of damages. *Id.*

4. Counsel fees for the trial of an action in which a temporary injunction has been issued cannot be recovered as damages upon the undertaking given upon the granting of the injunction unless it appear that such expenses were incurred by reason of the injunction. *Hovey* v. *R. T. P. Co.* 335

5. A party is entitled to damages for all expenses which he has incurred for fees and for legal expenses in removing the temporary injunction, and also any damages to his business or otherwise necessarily resulting from it. *Id.*

6. The right to a preliminary injunction or to an injunction *pendente lite* rests in all cases in the discretion of the court of original jurisdiction. An order, therefore, dissolving such an injunction does not affect a substantial right, and is not reviewable in this court. *People* v. *Schoonmaker.* 499

INSURANCE (FIRE).

1. In a survey which was referred to and made a part of a policy of fire insurance upon a paper mill, this inquiry was made, "Watchman: Is one kept in the mill or on the premises during the night and at all times when the mill is not in operation, or when the workmen are not present?" Answer: "Yes." On the day previous to the destruction of the property by fire, the personal property in the mill was levied upon by the sheriff, by virtue of an execution against the assured. The sheriff excluded the employes from the mill, took the keys and locked up the building. The deputy sheriff and one of the trustees of the assured remained in the office of the mill, about two rods from it, during the night, up to the time of the discovery of the fire, which occurred about 4 A. M., but they did not keep watch. In an action upon the policy,—*Held*, that the question and answer in the survey constituted a warranty, that the levy did not excuse from the obligation to perform it; that the deputy sheriff and trustee were not to be regarded as watchmen within the meaning of the policy, and that there being a breach of the warranty, plaintiff was properly nonsuited. *First Nat. Bank* v. *Prest., etc., Ins. Co. of N. A.* 45

2. Where a specific parcel of property is insured by a policy containing the usual clause providing for an apportionment of the loss in case of other insurance, and the same property is covered by another policy, which also includes other parcels, all insured together for an entire sum, this constitutes other insurance within the meaning of such clause. *Ogden* v. *E. R. Ins. Co.* 388

3. In case of total loss of all the property covered by the latter policy, the sum insured thereby is to be distributed among the several parcels in the proportion which such sum bears to the total value of all the parcels, and the portion allotted to the parcel specifically insured is to be considered the amount of additional insurance. *Id.*

4. If such portion, together with the amount of the specific policy, is less than the value of the parcel, there being no over-insurance, there is no occasion for any apportionment. *Id.*

5. An unrestricted authority to an agent of a fire insurance company to negotiate a contract of insurance by issuing a policy, includes authority to make a valid preliminary contract for such issue; and a parol agreement to that effect upon his part, and the receipt of the premium therefor binds the company. *Ellis* v. *A. C. Fire Ins. Co.* 402

6. One McC. was agent for several insurance companies, including defendant. Plaintiff applied for insurance upon a quantity of cotton; the amount to be insured and the premium was agreed upon, and McC. agreed to insure as requested. Plaintiff left it to McC. to determine in what companies he would place the insurance and the amount in each. He decided to place

$6,100 with defendant and entered the contract to that effect in his register, received the premium and credited amount to defendant, and before loss reported and paid over to defendant. *Held*, that this was, in substance, a contract to issue a policy for the amount so placed, and was binding upon defendant. (RAPALLO, ALLEN and ANDREWS, JJ., dissenting.) *Id.*

INSURANCE (LIFE).

1. The annual premiums paid during the first years of a life policy of insurance are not simply payments for the risk incurred from year to year, but are in excess of the actual risk, and this excess is so much paid in advance for the later years, in case of a prolonged life. The contract, while it is executed by the insured, by the payment of the annual premiums from year to year, is wholly executory upon the part of the insurer. It is a continuing contract, in the sense that it is to be performed in the future, but it is not a contract of continuance in its performance. The act required of the insured is a single act, to be performed at stated periods, and that to be performed by the insurer is single, *i. e.*, the payment of a specified sum upon the happening of a certain event. Such a contract, lawful in its inception, between the citizens of different States, and where large sums have been paid for premiums, is not dissolved by war between the States. The contract remains; the remedy simply is suspended, but revives with the return of peace. *Cohen v. N. Y. M. Life Ins. Co.* 610

2. The occurrence of war between the two States forbids and prevents the transmission of money for payment of the premiums from one State to another, and legally excuses the payment. A condition, therefore, in a life policy forfeiting it and all payments made thereon in case of non-payment of the annual premiums as they fall due, is suspended during the existence of the war, and a tender, after its termination, of the premiums unpaid, with interest upon each from the time it fell due, revives the policy. *Id.*

3. An incorporated life insurance company, although organized upon the mutual plan, is not a partnership, and when it has policy-holders in different States it is not dissolved by war between the States. *Id.*

4. Plaintiff's complaint alleged, in substance, that defendant, a corporation organized in the State of New York, in 1849, issued to plaintiff, a resident of the State of Georgia, a life policy upon the life of her husband, which policy contained a clause that, in case of non-payment of the annual premiums, "the said policy should cease and determine," and "all previous payments made thereon should be forfeited to the company;" that the annual premiums fell due upon the second of April in each year, and were paid regularly up to and including the year 1861; that plaintiff was ready and willing to pay the premium falling due April 2d, 1862, and those falling due during the existence of the civil war; that, in consequence of the war, all intercourse was interrupted and forbidden by the laws of the United States, and she was thereby prevented from making payment; that, as soon as communication was reestablished after the war, she tendered payment of the accrued premiums, but defendant refused to receive them, declaring the policy forfeited. Plaintiff asked that she be allowed to make the payments and the policy be declared valid, or that defendant be compelled to pay back the premiums paid, with interest, and the dividends, etc. Defendant demurred, that the court had no jurisdiction, and that complaint did not state a cause of action. Judgment was rendered sustaining demurrer. *Held*, that the contract was not dissolved, but suspended, by the war; that the payment of the premiums during its existence was

legally excused, and the tender revived the policy; that although there has been no loss, yet as there is an actual controversy, and the only parties to it are before the court; as the present rights of plaintiff under the contract are denied; as the contract of life insurance is a peculiar one; and as it is fit and proper the parties should know their rights under the contract, the case was a proper one for the exercise of the equitable powers of the court; and that the judgment was therefore error. *Id.*

5. The rule of the law of nations which annuls contracts between the citizens of two States upon the breaking out of a war between the States, has no application to life insurance, unless the policy insures against death while the assured is in the military service of his country. It is only such commercial contracts made prior to the war as give aid and comfort to the enemy, or such as are forbidden by or are against the policy of the government, that are dissolved. It is the settled policy of government to impair, as little as possible, the private rights of citizens by national differences. *Sands* v. *N. Y. Mut. Ins. Co.* 626

6. The payment of premiums upon a life policy, and the remedy in case the policy becomes due during the war, are simply suspended until peace is restored. No forfeiture will arise for the non-payment of the premiums during the war, provided they are promptly paid, with proper interest, on the return of peace. The condition in a policy of life insurance forfeiting the policy, in case of non-payment of premiums subsequently accruing thereon, is a condition subsequent, not precedent. *Id.*

7. Defendant had a general agent residing in Mobile at the time of the breaking out of the war of the rebellion; his authority to receive premiums was recognized by it after the issuing of the president's proclamation forbidding commercial intercourse. Plaintiff, who held a life policy issued by defendant upon the life of her husband, paid to such general agent, in Confederate currency, the premium thereon which fell due January 2d, 1862. *Held*, that this was a valid and effectual payment. *Id.*

See Hincken v. *M. B. Life Ins. Co.* (Mem.), 657

ISSUES, SETTLING OF.

See JURY, 3.

JOINT DEFENDANTS.

1. The General Term has not only authority but it is its duty, where the facts established require it, to reverse a judgment as to one or more of several joint defendants, and affirm it as to others. *Hubbell* v. *Meigs.* 480

2. Where an action is brought against two or more upon a joint contract, an equitable defence peculiar to one defendant being set up by him, the court may give judgment for the plaintiff against the other defendants, and for the one defendant against the plaintiff. *Barker* v. *Cocks* (Mem.). 689

JUDGMENT.

1. A party who, after having assigned a judgment, satisfies it, is liable to the assignees for the amount of the judgment in case the satisfaction piece was given upon payment, and for the damages sustained if it was given without payment, and the assignee is prejudiced thereby. *Booth* v. *Farmers' and Mechanics' National Bank.* 396

2. This liability attaches to a corporation where a judgment in its favor is, after assignment, satisfied by its president, he being its financial officer. *Id.*

3. The presumption arising from the giving of a satisfaction piece is that it was given upon payment of the judgment; and in the absence of proof to the contrary, it is sufficient to charge the party giving it with the receipt of the amount of the judgment. *Id.*

4. A satisfaction piece of a judgment in favor of a corporation, which shows upon its face that it was executed by its president in his official capacity, is binding upon the corporation, although not executed in the name of or under the seal of the corporation. *Id.*

5. No judgment can be entered upon a remititur of an order of this court reversing an interlocutory order of the Supeme Court, nor can the costs of the appeal be adjusted by the clerk. The proceedings are interlocutory, and costs are to be adjusted and collected as other interlocutory costs are collected. *Brown* v. *Leigh.* 427

See APPEAL, 23.
COSTS, 4, 6.
EVIDENCE, 2.
JOINT DEFENDANTS, 1, 2.
LIENS, 3.
Erickson v. *Quinn* (Mem.), 697.

JURISDICTION.

Although the ecclesiastical law of England is no part of the common law thereof adopted in this State, yet where, by our statutes, any part of the jurisdiction exercised by the ecclesiastical courts of that country was given to our courts, the settled principles and practice of those courts became a precedent and a guide; and the grant of that jurisdiction carried with it, by implication, the incidental powers indispensable to its proper exercise, and not in conflict with our own statutory regulations. *Brinkley* v. *Brinkley.* 184

See ARBITRATION, 8.
WRIT OF ERROR, 1, 2.

JURY.

1. Upon the trial of an indictment before the Superior Court of the city of Buffalo, in case the regular panel of jurors is exhausted, and it becomes necessary to summon talesmen, the court is not limited to the method prescribed by the twenty-ninth section of the act creating said court (§ 29, chap. 96, Laws of 1854, as amended by chap. 754, Laws of 1857), but it has power to order talesmen to be summoned in pursuance of the provisions of the Revised Statutes. (2 R. S., 733, § 3.) *Gaffney* v. *The People.* 416

2. A defendant has not an absolute legal right to have the facts, upon which plaintiffs' claim for equitable relief depends, tried by a jury. The mode of trial, in such cases, is a matter of discretion with the court, and its decision, in respect thereto, is not reviewable in this court. *Colman* v. *Dixon.* 572

3. A defendant has no absolute right to a preliminary order settling issues in an action for equitable relief to be tried by a jury. A refusal to grant such an order does not necessarily deprive the defendant of his right to such trial. If he has that right, and the cause is brought to trial before the court without a jury, the defendant may then object, and it will be the duty of the court to order the cause to be tried by a jury. If the court refuse so to do, defendant's remedy is by appeal from judgment. *Id.*

JUSTICES OF THE SUPREME COURT.

1. The words "in session," as used in section nine of article six of the State Constitution, which authorizes the governor, when the senate is not in session, to fill temporarily, by appointment, a vacancy in the office of justice of the Supreme Court, indicate a present acting or being of the senate as a body. When the sittings are terminated by a long adjournment and the actual meetings of the body thus interrupted, although the session

is continued, the senate is not "in session" within the intent and meaning of that section, and an appointment made by the governor during such an adjournment is valid. *People* v. *Fancher*. 288

2 An order denying a motion for a reargument, which motion is based upon the ground that a justice who heard and decided the case below sat as a member of the court upon the hearing of appeal from the judgment, is appealable to this court. *Graham* v. *Linden*. 547

3. Where the record shows that other justices heard and decided the case at General Term, this is not contradicted by proof that the justice before whom the case was tried, as presiding justice of the General Term, called the case when reached upon the calendar, and made some inquiries of counsel as to the papers. *Id.*

LACHES.

See BANKRUPTCY.

LAND.

See INFANTS, 1, 2.

LARCENY.

1. To constitute the offence of larceny there must be a taking of the goods from the power or control of the owner. A temporary possession, however, by the thief, though but for a moment, is sufficient. *Harrison* v. *The People*. 518

2. Plaintiff in error was indicted for larceny. The evidence showed that he put his hand into the coat pocket of complainant, seized the pocket-book of the latter containing a large amount of money and securities, and lifted it about three inches from the bottom of the pocket, when he was prevented. *Held*, that this was a sufficient carrying away to constitute the offence charged. *Id.*

LIBEL.

In proceedings by one C. for his discharge in bankruptcy, defendant, E., a creditor, opposed his discharge upon the ground that he was a partner in the firm of M. & Co., and had fraudulently omitted from his inventory his interest in the property of said firm. Plaintiff, a member of said firm, was called as a witness by the defendants upon the hearing before the register. Plaintiff's testimony tended to show that C. was not a member of the firm. Defendant, C., as attorney for E., filed objections to the discharge; among others, one charging the bankrupt with procuring plaintiff to testify falsely as to who were the partners in the firm, and as to the connection of the bankrupt therewith. In an action of libel,—*Held*, that the question as to whether the evidence of plaintiff was true or false was material and pertinent; that defendants were not precluded by the fact that plaintiff was called as a witness by defendant, E., from insisting that his testimony was false; and that the publication was privileged. *Marsh* v. *Ellsworth*. 309

LIENS.

1. A mortgage executed for the purpose of raising money thereon for the mortgagor, and without any delivery to or consideration being paid therefor by the mortgagee, only has life and validity from the time of its assignment and delivery to an assignee for value; and this transaction cannot have a retroactive operation so as to give effect to the mortgage at an earlier day, to the prejudice of others having rights, legal or equitable, existing at that time. Nor can these rights be affected or destroyed by any act or representation of the mortgagor. *Schafer* v. *Reilly*. 61

2. Accordingly *held*, that where such a mortgage was executed and recorded and subsequently negotiated, but before its assignment and delivery another person acquired

a lien upon the mortgaged premises, the latter lien had the priority; and this was so, although the assignee, before taking the assignment, required and obtained from the mortgagor an affidavit that the mortgagee advanced the whole sum of principal secured by the mortgage without abatement, and that there was no offset, defence or counter-claim thereto. *Id.*

3. A specific equitable lien upon lands will not be preferred to a prior lien by judgment thereon, and this is so, although the lands are acquired by the debtor after the recovery of the judgment. Nor does the fact that the foundation of the equitable lien is moneys, used to improve and save the property, entitle it to priority. *Cook* v. *Banker* (Mem.). 655

4. The expenditure of the money of one upon the lands of another, or in which that other has a prior interest, if it be without the request or sanction of the latter, express or implied, creates no legal or equitable right that will override his estate or interest. *Id.*

See MECHANIC'S LIEN.
MORTGAGE, 4.
Debbe v. *Debbe* (Mem.), 695.
Erickson v. *Quinn* (Mem.), 697.

LIMITATION OF ACTIONS.

1. By the provisions of section 8 of the usury laws of this State (1 R. S., 772, § 3), the right of action of a borrower, who has paid usurious interest, for the recovery of the excess is terminated at the end of one year, and is then transferred to the officers named in section 4. (ALLEN and FOLGER JJ., dissenting.) *Palen* v. *Johnson.* 49

2. Section 78 of the Code, which limits the time for the commencement of actions for the recovery of the possession of real property to twenty years, includes only those actions which, prior to the Code, were actions at law for the recovery of real property or its possession. *Miner* v. *Beekman.* 338

3. Where one claiming to be the owner in fee of lands subject to the lien of a mortgage, of which lands the mortgagee is in possession, institutes an action seeking for an accounting, for liberty to pay the amount ascertained to be due upon the mortgage, and upon payment to be let into possession; such action is not embraced within section 78, but comes within the provisions of section 97, which limits the time for the commencement of actions for relief, not before provided for in the preceding sections, to ten years. *Id.*

4. Such a cause of action, however, does not accrue when the money secured by the mortgage becomes due, but only when the mortgagee enters into possession; and *it seems* not then if the mortgagee enters and continues in possession avowedly as mortgagee, not claiming the fee. While the owner of the fee of lands continues liable to an action for the foreclosure of a mortgage or for the payment of any incumbrance thereon which is past due, he has a continuing right to invoke the aid of equity to determine the amount of the lien, if uncertain, and to compel its discharge upon payment; and an action to enforce this right cannot be barred by the statute of limitations. *Id.*

5. But where a purchaser upon a foreclosure sale enters into possession, claiming title under such sale, the right to an action for this equitable relief, of a grantee, from the mortgagor, as to whom the foreclosure is a nullity, for the reason that he was not made a party thereto, is barred after the possession of the purchaser or his grantee has continued for ten years. *Id.*

6. The provisions of the Code limiting the time for the commencement of actions for the recovery of the possession of real property (Code, § 78), and that within which a cause of action or defence found-

ed upon a title to real property may be maintained or interposed (§ 79), apply only to those actions where the remedies sought were prior to the Code administered by courts of law. They have no reference to actions where the desired remedies were administered exclusively by courts of equity. *Hubbell* v. *Sibley*. 468

7. An action by a mortgagor against a mortgagee in possession for an accounting, and for the recovery of possession of the mortgaged premises upon payment of what shall be found due, seeks a purely equitable remedy, and comes within the provision of section 97 of the Code limiting the time for the commencement of actions not otherwise specified to ten years. The cause of action accrues at the time of entry of the mortgage under claim of title, and the statute then begins. *Id.*

8. The short statute of limitations (2 R. S., 89, § 38), by which one having a claim against the estate of a deceased person may be barred of his action and his claim forfeited, is penal in its character, and is to be strictly construed. To entitle an executor or administrator to the benefit thereof, the statute must in all essentials be complied with. His act in disputing or rejecting the claim must be decided, unequivocal and absolute. Whatever may be the language or declaration, if in the same notice or declaration, or at the same time, he does or says anything from which the claimant may reasonably infer that the determination to dispute or reject is not final, the claim is not "disputed or rejected" within the meaning of the statute. *Hoyt* v. *Bonnett*. 538

9. Plaintiffs presented to defendants, as executors of W., certain claims against the latter's estate. The latter caused to be served upon the former a written notice, stating in substance that as at present advised they declined to pay the claims, and stating that as they had no other means of information they would be greatly obliged if appellants would furnish them with a bill of particulars. The claims so presented were claims against two firms, in which defendants' testator had been a partner. At the time of the presentation no steps had been taken to collect these claims of the surviving partners or out of the partnership property. No action was commenced by plaintiffs within six months after the service of notice, nor did they make any offer to refer. In the account presented by defendants, upon their final accounting, plaintiffs' claims were omitted. They appeared and objected to the account upon that ground. The surrogate overruled the objections, passed the accounts, and decreed distribution without reference to plaintiff's claims. *Held*, error; that defendants had not disputed or rejected the claims so as to put the statute in operation, and the action was not barred; also, *held*, that there was no absolute or certain debt due either at law or in equity from the estate of the decedent to plaintiffs at the time they exhibited their claims; that such claims did not constitute debts against the estate until the liability had become fixed by an inability to collect the same against the surviving partners, and that even if the claims had been rejected or disputed by the notice served, the statute did not then begin to run, and that the surrogate, instead of making a final distribution of the estate, to the exclusion of plaintiffs, should have made a reasonable provision for their claims by directing a sum sufficient to satisfy the claims to be retained, to be applied to the payment thereof when due. *Id.*

10. A foreign railway corporation cannot claim the benefit of the statute of limitations of this State in an action of which the courts of this State have jurisdiction, although it has before the commencement of the action for the time specified in the statute continuously operated and carried on a railroad in this State, having a large amount of property for all that time within the State and

having a managing agent resident therein. *Rathbun* v. *N. C. R. Co.* (Mem.). 656

MAIMING.

See MAYHEM.

MALPRACTICE.

1. In an action against a surgeon for malpractice, the question as to whether or not he is skillful in his profession is one of the material issues. If he has not competent skill, he is censurable for holding himself out as possessing it, and is strictly accountable for the consequences of his acts; and having adopted a process which was not successful, to the exclusion of one which might and probably would have proved so, he is not entitled to the benefits which would inure to the skillful surgeon from an error of judgment, or mistake in the appliances and means at command of the expert. *Carpenter* v. *Blake* (Mem.). 696

2. Accordingly, *held* (CHURCH, Ch. J., PECKHAM and GROVER, JJ., dissenting), that a charge to the jury that it was immaterial whether defendant was or was not reputed to be, or was or was not a skillful surgeon, was error *Id.*

MANUFACTURING CORPORATIONS.

1. The trustees of a manufacturing corporation organized under the act to authorize the formation of corporations for manufacturing and other purposes (chapter 40, Laws of 1848) are neither parties nor privies to a judgment against the company; and where, in consequence of a failure to make and file an annual report as required by section 12 of that act, they have become liable to pay the debts of the company, and an action is brought against them to enforce that liability and collect a debt due from the company, proof of the recovery of such a judgment thereon is neither conclusive nor *prima facie* evidence of the debt. *Miller* v. *White.* 187

2. The right of a creditor of a manufacturing corporation, organized under the act of 1848, authorizing the formation of corporations for manufacturing and other purposes (Laws of 1848, chap. 40), to maintain an action against one or more of the stockholders of such corporation to enforce the liability imposed upon them by said act (section 10), is a several and distinct right, and not a joint right in the creditors generally. *Weeks* v. *Love.* 568

3. He can, therefore, sue alone to enfore this liability, although there may be other creditors similarly situated. *Id.*

MAYHEM.

1. Section 36 of the article of the Revised Statutes entitled "Of rape, maiming," etc. (2 R. S., 665, § 34), was intended as a statute definition of the crime of mayhem, and the term now includes only those injuries therein enumerated. A blow, aimed at and delivered upon the head, cannot constitute the crime of assault and battery, with intent to maim. *Foster* v. *The People.* 598

2. The prisoner intentionally aimed a blow, with an iron rod, at the head of the deceased, with a force likely to fracture the skull, and which did in fact crush it. The prisoner's counsel, upon the trial, requested the court to charge that, upon the indictment and evidence, the jury could convict the prisoner of murder in the second degree, and that if the prisoner killed the deceased by an assault upon him with a dangerous weapon, with intent to maim but without any intent to effect death, such killing was murder in the second degree. The court refused so to charge. *Held*, no error; that there was no evidence in the case which would justify the finding that the prisoner, when he inflicted the blow,

intended to maim, or was engaged in the commission of, or intended to commit any felony other than the homicide with which he was charged; that fracturing the skull was not maiming, and even if it should be so assumed, as death was likely to result therefrom, an intent to fracture the skull, without killing, could not be predicated of the act; that the requests to charge were therefore irrelevant and inapplicable to the facts, and the court was justified in refusing. *Id.*

MECHANICS' LIEN.

1. An act authorizing property to be encumbered without or against the consent of the owner, and without resort to legal process or judicial action, is an innovation upon the common law, and will not be extended in its operation beyond the fair and reasonable import of the words used. *Mushlitt* v. *Silverman.* 360

2. One asserting a lien by virtue of a mechanics' lien law must bring himself within its terms, and the lien must be shown not only to have been regular and valid in its inception, but to be a continuing and subsisting one. *Id.*

3. Plaintiffs sought to enforce a lien under the act giving mechanics and others liens for labor and materials furnished in the construction of buildings in the county of Kings. (Laws 1862, chap. 478.) Defendant proved the service of a notice upon plaintiffs, in pursuance of subdivision 4 of section 7 of said act, which declares that the lien shall be discharged by the omission of the lienor to file an affidavit of the issuing or service of a summons and complaint in an action to enforce the lien within thirty days after the time specified in a notice by the owner, requiring the commencement of an action for the enforcement of the lien on or before a specified day and hour. The action was commenced within thirty days after the specified time, but no affidavit of the issuing or service of the summons and complaint was filed within that period. *Held*, that the lien was discharged. *Id.*

MERGER.

See BANKRUPTCY.

MILITARY LAW.

See COURTS-MARTIAL, 2.

MORTGAGE.

1. One who takes an assignment of a mortgage, takes it subject not only to any latent equities that exist in favor of the mortgagor, but also subject to the like equities in favor of third persons. *Schafer* v. *Reilly.* 61

2. A mortgage executed for the purpose of raising money thereon for the mortgagor, and without any delivery to or consideration being paid therefor by the mortgagee, only has life and validity from the time of its assignment and delivery to an assignee for value; and this transaction cannot have a retroactive operation so as to give effect to the mortgage at an earlier day, to the prejudice of others having rights, legal or equitable, existing at that time. Nor can these rights be affected or destroyed by any act or representation of the mortgagor. *Id.*

3. Accordingly *held*, that where such a mortgage was executed and recorded and subsequently negotiated, but before its assignment and delivery another person acquired a lien upon the mortgaged premises, the latter lien had the priority; and this was so, although the assignee, before taking the assignment, required and obtained from the mortgagor an affidavit that the mortgagee advanced the whole sum of principal secured by the mortgage without abatement, and that there was no offset, defence or counter-claim thereto. *Id.*

4. The lien of a mortgage cannot be discharged, in whole or in part, by a tender of less than the whole amount due thereon. This rule is not affected by the fact that only a portion of the amount due belongs to the holder, and the balance to some other person for whom he holds the mortgage in trust. *Graham* v. *Linden*. 547

See EQUITY, 1.
FORECLOSURE.
LIMITATION OF ACTIONS, 3, 4, 5.
USURY, 5.
Killip v. *Metzen* (Mem.), 658.
Fitzhugh v. *Sackett* (Mem.), 699.

MOTIONS AND ORDERS.

See APPEAL, 1, 4, 10, 11, 15.
BANKRUPTCY.
COMMISSIONS, 3.
COSTS, 2.
F. Nat. Bank v. *Leland* (Mem.), 673.
Erickson v. *Quinn* (Mem.), 697.

MUNICIPAL CORPORATIONS.

1. Where the power is conferred upon public officers or a municipal corporation to make improvements, such as streets and sewers, and keep them in repair, the duty to make them is *quasi* judicial or discretionary, and for a failure to exercise the power or an erroneous estimate of the public needs, no civil action can be maintained. But when the discretion has been exercised and the improvement made, the duty of keeping it in repair so as to prevent its being dangerous to the public is ministerial, and for a negligent omission to perform it an action by the party injured will lie. *Hines* v. *City of Lockport*. 236

2. The absence of necessary funds and of legal means to procure them will excuse the neglect, but must be shown as a defence. *Id.*

3. Where by the charter of a city its common council are constituted commissioners of highways, and they are authorized to use certain funds in defraying the expenses of repairing and keeping in order the streets, highways, etc., this is sufficient to cast upon the city the duty of keeping the crosswalks in safe condition which have been constructed in streets or highways under the direction of the city, and the fact that provisions are made in the charter authorizing assessments for local improvements, including such repairs, does not relieve the city from that duty. *Id.*

MURDER.

1. To constitute murder in the second degree, under the act of 1862 (chap. 197, Laws of 1862), the killing must be by a person engaged at the time in the commission of a felony, other than arson in the first degree. *Foster* v. *The People*. 598

2. The prisoner intentionally aimed a blow, with an iron rod, at the head of the deceased, with a force likely to fracture the skull, and which did in fact crush it. The prisoner's counsel, upon the trial, requested the court to charge that, upon the indictment and evidence, the jury could convict the prisoner of murder in the second degree, and that if the prisoner killed the deceased by an assault upon him with a dangerous weapon, with intent to maim but without any intent to effect death, such killing was murder in the second degree. The court refused so to charge. *Held*, no error; that there was no evidence in the case which would justify the finding that the prisoner, when he inflicted the blow, intended to maim, or was engaged in the commission of, or intended to commit any felony other than the homicide with which he was charged; that fracturing the skull was not maiming, and even if it should be so assumed, as death was likely to result therefrom, an intent to fracture the skull, without killing, could not be predicated of the act; that the requests to charge were therefore irrelevant

and inapplicable to the facts, and the court was justified in refusing. *Id.*

NATIONAL BANKS.

1. No privilege of immunity from the usury laws of the States is conferred upon national banks by the act of congress of 1864 (13 Stat. at Large, 99), and a contract for a loan, made in this State, with one of these organizations, by which it reserves a greater rate of interest than seven per cent, is void. *First Nat. Bank* v. *Lamb.* 95

2. The provision of section 30 of said act, limiting the forfeiture to the interest, has reference only to the preceding sentence, which prescribes a rate of interest in those States and Territories where no rate is fixed by law. A construction of this provision which would make it applicable to contracts made in States where the rate of interest is regulated, and which would bring it in conflict with State laws, would render it unconstitutional. *Id.*

3. The power to create a corporation as an appropriate instrument for the execution of a constitutional power vested in the federal government, only carries with it authority to confer upon that corporation such privileges or immunities from State laws as are necessary to enable it to effect the legitimate national object for which it is created. No such national object requires that national banks should exceed the rates of interest fixed by the States, and no immunity from State usury laws is, therefore, necessary. *Id.*

NEGLIGENCE.

1. On the 20th February, 1869, plaintiffs shipped by defendant's line a quantity of butter to be carried from New York to Georgetown, consigned to plaintiff's order; the packages were unmarked. One S. presented to defendant's delivery clerk a letter written by plaintiffs to him, containing this clause: "The roll sent you today (the twentieth) you will find of very good quality," and upon this the clerk delivered the butter to S. In an action for the conversion plaintiffs were nonsuited. *Held*, that, as a question of law, the letter was not a sufficient authority to justify a delivery of the butter to S.; nor was the writing of it negligence *per se*, but it was a question of fact for the jury to determine, from the letter and the other facts of the case, whether from plaintiffs' negligence or otherwise the defendant was excused or justified in the delivery of the property. The nonsuit was therefore error. *Viner* v. *N. Y. A. G. & W. S. Co.* 23

2. The undisputed existence of a fact sometimes constitutes negligence at law; but where inferences are to be drawn, or it depends upon circumstances, it is a question of fact to be determined by a jury. *Id.*

3. It is the duty of a ferry company not only to carry its passengers safely, but not to injure them by any act of carelessness or negligence. It is negligence for its employes to order teams to pass off its boat before the bridge, prepared for that purpose, is properly adjusted. *Hazman* v. *H. L. & I. Co.* 53

4. Plaintiff was passing on to one of defendant's ferry-boats. In consequence of the crowd moving off the boat he was obliged to step upon the stringer, separating the passage from the carriageway. Plaintiff's witnesses testified that before the bridge was adjusted to the level of the boat, and while it was some eight or nine inches above it, defendant's employes dropped the chain and ordered the teams to pass off. A horse, attached to a heavy laden cart, in attempting to do so, struck his foot against the bridge and fell; the shaft of the cart struck plaintiff and broke his leg. The jury found a verdict for plaintiff.
Held, that ordering the teams from the boat before the bridge was

properly adjusted was a negligent act, likely to produce the result which followed to the horse; that it was not negligence, as matter of law, for the plaintiff to be going upon the boat, according to the usual custom, before those disembarking had all passed off, nor, under the circumstances, to be standing upon the stringer; and that the evidence was, therefore, sufficient to go to the jury and sustain their finding. *Id.*

5. The right of a railroad company to lay its tracks in a street or public highway carries with it the obligation to lay them in a proper manner, and to keep them in repair; and if an injury occurs, by reason of a neglect in either of these respects, it is liable. *Worster* v. *Forty-second Street & G. St. F. R. Co.* 203

6. No notice to it of a patent defect is necessary; but when it appears that the defect existed and an injury was caused thereby, the presumption of negligence is complete. If circumstances exist showing absence of negligence, as that the defect had not existed for a sufficient length of time to create a presumption of knowledge, or to enable it to repair, it is for the company to prove. *Id.*

7. Where one, under a contract with a municipal corporation, has made an excavation in a public street or highway, and refilled the same, it is his duty to know the natural qualities of earth thus thrown out and replaced (*i. e.*, that it will shrink and settle when soaked with water), to anticipate the result upon it of a rain-fall, and to see that during and after a rain it is in a proper and safe condition, or to take such measures of prudent forethought as will protect the public passing by from damage, and for neglect of this duty he is liable to the party injured. *Johnson* v. *Friel* (Mem.). 679

NEW TRIAL.

See APPEAL, 21.
Campbell v. *Page* (Mem.), 658.

NEW YORK CITY.

1. The owners of property adjoining a street in the city of New York, laid out under the act of 1813, have an easement in the street, in common with the whole people, to pass and repass, and also to have free access to their premises; but the mere inconvenience of such access occasioned by the lawful use of the street by a railroad is not the subject of an action. *Kellinger* v. *42d St. and G. St. F. R. Co.* 206

2. A newspaper, appointed by the common council of the city of New York as an official paper prior to the passage of the amended charter of 1857 (chapter 446, Laws of 1857), in the absence of any subsequent action of that body, continued in that position, and the presumption is, in the absence of proof of such action, that it did so continue. *In re Astor.* 363

3. The provisions of the acts known as the tax levies for the city of New York for the years 1863 (chapter 227, Laws of 1863), 1867 (chapter 586, Laws of 1867) and 1868 (chapter 853, Laws of 1868), limiting the number of official papers to be employed, and selecting the officers of the corporation to designate them, fall within the general subject indicated by the title to those acts, that is, the raising of money for the support and government of that city and regulating the expenditure thereof, as their effect is to limit the expenditure; they are, therefore, not repugnant to the sixteenth section of article three of the Constitution, providing that no local or private bill shall embrace more than one subject, and that shall be expressed in the title. *Id.*

4. These provisions being general in their nature, and not being restricted in their operations by the terms of the acts, remained in force until changed by the legislature. *Id.*

5. Under the act of 1868 the New York Leader was selected as an official newspaper. There was no

change made in 1869 either in the power to appoint or the appointment. A resolution and ordinance was adopted by the common council in 1869 for the paving of a portion of Fourteenth street with Nicolson pavement. This was not published in the Leader. *Held*, that the appointment of that paper, as an official newspaper, continued; and the proceedings not having been published as required by section 7 of the amended charter of 1857 (chapter 446, Laws of 1857), the assessment for the purposes of the work was void. *Id.*

6. The provision of the act regulating the opening and laying out of streets, etc., in the city of New York, which declares that the reports of commissioners of estimate and assessment, appointed under it, when confirmed, shall be "final and conclusive" (§ 178, chap. 86, Laws of 1813; 2 R. S., 408), was not repealed or affected by the general provisions of the Code prescribing the jurisdiction of this court (Code, § 11), and an order confirming the report of commissioners of estimate and assessment appointed in proceedings by the commissioners of the Central park under the act for the laying out and improvement of certain portions of the city of New York (chap. 697, Laws of 1867), which proceedings were governed by the act of 1813, is not appealable to this court. *In re Com. of Central Park.* 493

7. An assessment for local improvements under the act of 1871, amending the act reorganizing the local government of New York (chap. 574, Laws of 1871), is invalid unless the commissioner of public works has certified to the board of assessors the amount of expenses paid or actually incurred by the city, as required by section 5 of said act. No other evidence can be substituted. *In re Cameron.* 502

8. An assessment was made for paving a portion of Madison avenue. The certificate of the commissioner only stated the prices fixed by the contract for the work. It was accompanied by an affidavit of the surveyor stating the amount of work done, but the affidavit was not referred to in the certificate or made part thereof. *Held*, that the provision of the act was not complied with, and the assessment was void. *Id.*

9. In an application to vacate an assessment under the act in relation to frauds in assessments for local improvements in the city of New York (chap. 338, Laws of 1858), the *onus* of establishing the alleged frauds or irregularity is upon the applicant, and he must make it appear that such fraud or irregularity exists before he is entitled to the relief sought. *In re Basford.* 509

10. A single publication of a resolution authorizing a specific improvement in the city of New York, two days before its adoption, is a sufficient compliance with the provision of the city charter of 1857 (§ 7, chap. 446, Laws of 1857), which prohibits the passage or adoption of such resolution until it has been published in all the newspapers employed by the corporation at least two days. (Opinion of INGRAHAM, J., note.) *Id.*

11. The grant of power to the common council of the city of New York by the "Montgomerie charter," so called (Davies' Laws of N. Y., p. 177, § 16; Valentine's Laws, 228), to make and lay out streets, etc., in said city, and the authority conferred upon the municipal corporation to direct the pitching and paving of streets, and to assess the expense upon property benefited (Laws of 1813, chap. 86, § 175; 2 R. L., 407), gives the common council full discretion, save as curtailed or controlled by legislative action. They are the sole and exclusive judges as to the time, mode and manner of laying out, making, grading and paving streets, and also as to the material of which the streets shall be made, or with which they shall be paved. This discretion and choice being an important and valuable constituent of the power conferred, and being

in the interests of the public, will not be deemed revoked by implication or doubtful inference. *In re Dugro.* 513

12. Accordingly *held*, that the common council was not prohibited from making or paving a street in a manner or with a material not admitting of competitive bids or proposals by the provision of the "act to reorganize the local government of New York," which requires all work to be done and supplies to be furnished to be by contract, where the expenditures will exceed $1,000; and directs all contracts to be made or let, after advertisement, to the lowest bidder. (Laws of 1870, chap. 137, § 104.)

See CONSTITUTIONAL LAW, 9.

NOTICE.

See CONSTRUCTIVE NOTICE.
NEGLIGENCE, 6.
WILLS, 7.

OFFICE AND OFFICERS.

See ELECTIONS.
MUNICIPAL CORPORATIONS, 1.

PARTIES.

1. The right of a creditor of a manufacturing corporation, organized under the act of 1848, authorizing the formation of corporations for manufacturing and other purposes (Laws of 1848, chap. 40), to maintain an action against one or more of the stockholders of such corporation to enforce the liability imposed upon them by said act (section 10), is a several and distinct right, and not a joint right in the creditors generally. *Weeks* v. *Love.* 568

2. He can, therefore, sue alone to enforce this liability, although there may be other creditors similarly situated. *Id.*

See ATTACHMENTS, 7, 9.
INJUNCTION, 1.

PARTNERSHIP.

1. One who has been engaged in carrying on business in the name and ostensibly as a member of a firm, will not be permitted to urge against his own acts, in dealing with third persons, the non-existence of the firm by reason of a want of consent of one of the intended members, although by the articles of partnership such consent was necessary to its existence. *McStea* v. *Matthews.* 166

2. By the implied and express permission of the federal government, evidenced by the proclamations of the president at the outset of the war of the rebellion (proclamations of April 15 and April 19, 1861), and by the act of congress of July 13, 1861, commercial intercourse between citizens of the insurrectionary States and of the loyal States was permitted and was lawful, until the issuing of the president's proclamation of August 16th, 1861, declaring such intercourse unlawful; a copartnership therefore existing between citizens of the two sections was not terminated, by reason of the war, until that date. *Id.*

See INSURANCE (LIFE), 3.
LIMITATION OF ACTIONS, 9.

PARTY WALL

1. Adjoining proprietors have each an easement in the land of the other covered by a party wall, and the title of each owner is qualified by the easement to which the other is entitled. This easement includes the right to increase the height of the wall, provided such increase can be made without detriment to the strength of the wall, or to the property of the adjacent owner. The party making the addition, however, does it at his peril; he must insure the

safety of the work, and if injury results he is liable. *Brooks* v. *Curtis*. 639

2. S., owning two adjoining lots, erected a house on each, with a party wall between them. He conveyed one lot to plaintiff's and one to defendant's grantor, by deeds recorded the same day. The description in the former deed conveyed the party wall and two inches beyond. Plaintiff brought action to recover possession of the strip from the center of the party wall to the boundary line. *Held*, that plaintiff's premises were charged with a servitude of having the wall stand as an exterior wall to defendant's house and as a support to its beams so long at least as the buildings should endure; that the right to use the party wall necessarily carried with it the right to occupy the two-inch space with the timbers which were to find support in the wall, and to have the buildings and wall remain as they were at the time of the conveyances from S., while they endure; that actual possession, therefore, could not be given to plaintiff. *Rogers* v. *Sinsheimer*. 646

PATENTS.

See Collins v. *Hall* (Mem.), 687.
Rowley v. *Woodruff* (Mem.), 700.

PENALTY.

See SUMMONS.

PERSONAL PROPERTY.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.
HUSBAND AND WIFE, 2, 4.
WILLS, 5, 6, 7.

PLANK-ROAD COMPANY.

1. The rule of the common law, that real estate held by a corporation at the time of its dissolution reverts to the grantor, does not prevail in this State in respect to stock corporations. Where lands are conveyed absolutely to a corporation having stockholders, no reversion or possibility of a reverter remains in the grantor. *Heath* v. *Barmore*. 302

2. A corporation organized under the plank-road laws of this State is authorized to take, by purchase, the entire fee of lands needed for its road, and no condition or qualification of the grant will be implied in an absolute conveyance to it in fee. The grantor retains no property therein which will prevent a division of the property among its stockholders or which will preclude the State, with the assent of the company, from diverting the land to other public uses, or from declaring by law that a surrender of any part of the road by the company shall operate to transfer the title of the company to the town in which the land is so located. *Id.*

3. The provisions of the act of 1854 in relation to plank-roads, etc. (chap. 87, Laws of 1854), which authorize a plank-road company to surrender all or any portion of its road, and provide that in such case a portion surrendered shall cease to belong to the company, and shall revert and belong to the several towns, etc., make such surrender equivalent to an alienation by the company, and embrace as well land which never before belonged to the towns as those which were public highways when acquired by the company, and the act cannot be assailed upon the ground that it takes the property of the grantor to the company for public use without just compensation. *Id.*

PLEADING.

1. Plaintiff's complaint alleged in substance that he was induced by fraudulent representations on the part of defendant to purchase and pay for certain stocks; that upon

discovery of the fraud, he elected to rescind the contract, tendering back the stocks purchased, and demanded the money paid therefor, which defendant refused to pay, etc. He claimed to recover the alleged purchase-money paid. Upon the trial it appeared that plaintiff paid no money for the stocks, but only credited defendant the amount of the purchase-price upon a prior indebtedness. *Held* (PECKHAM, J., dissenting), that the rescinding the contract restored plaintiff to his original right as to the prior indebtedness and made the credit a nullity; that the credit could not be regarded for the purposes of the action as so much money paid, and thus a judgment be recovered which could be enforced by imprisonment, and that plaintiff was not entitled to recover. *Degraw* v. *Elmore*. 1

2. The Code does not authorize a recovery when the complaint alleges facts showing a cause of action in tort by proving upon the trial the cause of action in contract. *Id.*

3. Where, in an action upon a promissory note, the answer alleges facts sufficient to constitute a defence for want of consideration or for a recoupment of damages, it is not necessary for defendant to state which he will rely upon; and if he so states, he will not be precluded from insisting upon any defence which the facts alleged will justify. It is the facts alleged which constitute the defence, and whether or not it is called by the right name is immaterial. *Springer* v. *Dwyer*. 19

See ALIMONY, 1, 4.

PLEDGE.

See DEMAND.

POWER OF ATTORNEY.

See Ouiver v. *W. U. T. Co.* (Mem.), 691.

PRACTICE.

1. A defendant has no absolute right to a preliminary order settling issues in an action for equitable relief to be tried by a jury. A refusal to grant such an order does not necessarily deprive the defendant of his right to such trial. If he has that right, and the cause is brought to trial before the court without a jury, the defendant may then object, and it will be the duty of the court to order the cause to be tried by a jury. If the court refuse so to do, defendant's remedy is by appeal from judgment. *Colman* v. *Dixon*. 572

2. Where, upon appeal to this court from an order granting a new trial in an equity case, the order is affirmed and judgment absolute ordered against appellant "without costs to either party," this disposes of all the costs in the action, and an insertion by respondent of costs in the judgment entered upon the remittitur is irregular. *Patten* v. *Stitt*. 591

3. A motion to correct the judgment is the proper remedy. Whether an appeal from the judgment is proper in such case, *quere*. *Id.*

4. A judgment should not be set aside on account of an improper taxation of costs, or a taxation without notice. A readjustment should be ordered, and the amount of reduction, if any, be deducted from the judgment. *Watson* v. *Gardiner* (Mem.). 671

See APPEAL, 18.
BANKRUPTCY.
JURISDICTION.
PLEADINGS.
Morgan v. *Mulligan*, 665.

PRECEDENTS.

Precedents drawn from the action of legislative committees are not satisfactory. (Per FOLGER, J.) *People ex rel.* v. *Clute*. 451

PRESUMPTIONS.

1. Where one indorses a promissory note payable to another or order, prior to its delivery to the payee, in the absence of proof that he indorsed with intent to become surety for the maker to the payee, the legal presumption is that he stands in the position of subsequent indorser; and the payee can neither maintain an action upon the indorsement, nor can he transfer a right of action thereon to a purchaser with notice, except upon assuming the responsibility of first indorser. *Phelps* v. *Vischer*. 69

2. The presumption arising from the fact of possession of a bill of exchange by the drawee and acceptor, is that it is in his possession for acceptance or after payment; such possession gives no apparent ownership or presumptive right to transfer the same. (PECKHAM, J., dissenting.) *Central Bank of Brooklyn* v. *Hammett*. 158

3. A newspaper, appointed by the common council of the city of New York as an official paper prior to the passage of the amended charter of 1857 (chapter 446, Laws of 1857), in the absence of any subsequent action of that body, continued in that position, and the presumption is, in the absence of proof of such action, that it did so continue. *In re Astor*. 363

4. The presumption arising from the giving of a satisfaction piece is that it was given upon payment of the judgment, and in the absence of proof to the contrary, it is sufficient to charge the party giving it with the receipt of the amount of the judgment. *Booth* v. *F. and M. Nat. Bank*. 396

5. Every presumption is in favor of the validity of legislative acts, and they are to be upheld unless there is a substantial departure from the organic law. *People ex rel.* v. *Briggs*. 553

6. No presumptions will be indulged in, in favor of exemptions from common law liability. *Edsall* v. *C. and A. R. and T. Co.* (Mem.) 661

7. While it is competent for common carriers to provide by contract for such exemptions, it must be done in clear and unambiguous terms, and the rule that the language of contracts if ambiguous is to be construed against the party using it should be rigidly applied to such contracts. *Id.*

See BAILMENTS, 1.
FORECLOSURE, 3.
NEGLIGENCE, 6.
Morgan v. *Mulligan* (Mem.), 665.

PRINCIPAL AND AGENT.

1. Where an agent converts property of his principal in his hands, and which he has agreed to account for and pay over, the principal has his election to sue for the breach of the contract or for the conversion; and if he elects to proceed for a breach of the contract, he may interpose it as a counterclaim in an action upon contract brought against him by the agent. *Coit* v. *Stewart*. 17

2. It is not necessary to show fraud, upon the part of an agent, in order to maintain an action against him for neglecting to perform a duty which he has undertaken. An agent is bound, not only to good faith, but to reasonable diligence, and to such skill as is ordinarily possessed by persons of common capacity engaged in the same business. *Heinemann* v. *Heard*. 27

3. Plaintiffs sent to defendants, their correspondents in China, an order to invest £5,000 in silk, of one or the other of several specified descriptions, at prices named, and in accordance with the terms of a letter of credit which required bills to be drawn prior to July 1st. Defendants did not comply with the order; and in answer to plaintiff's complaints wrote, admitting that the silk could have been purchased within the prescribed prices, but stating, as an excuse for not purchasing, that they expected prices to be lower, and, therefore, waited until the prices advanced beyond their limits, and express-

ing regret at their erroneous judgment. *Held*, that the order gave defendants no discretion, save as to the selection of the silk. That it was their duty to have selected some of the descriptions specified, if they were to be obtained, in time to ship under the letter of credit. That defendants' letter was an admission of their ability to have executed the order, which, although it did not preclude them from showing any impediment preventing performance, yet was sufficient to require the submission of that question to a jury. *Id.*

4. The possession by an assumed agent of a promissory note payable to the order of the payee, and not indorsed by him, is not alone sufficient evidence of his authority to authorize a payment thereof to him. *Doubleday* v. *Kress.* 410.

5. The payee of such a note delivered it to an agent with authority to receive the interest thereon, and to take a new note with an indorser. The maker paid principal and interest to the agent. In an action by the payee upon the note,—*Held* (CHURCH, Ch. J., and GROVER, J., dissenting), that the agent was not authorized to receive payment of the principal in money and that plaintiff was entitled to recover. *Id.*

6. An agent employed by a trustee to collect a claim, the subject of the trust, has no right to undertake the discharge of the trust, and in an action against him by his principal for refusal to pay upon demand the moneys collected, it is no defence that he has paid it to one claiming to be the *cestui que trust*. *Hancock* v. *Gomez* (Mem.). 668

See INSURANCE (FIRE), 5, 6.
INSURANCE (LIFE), 7.
Whitin v. *Pendegast* (Mem.), 674.
Culver v. *W. U. T. Co.* (Mem.), 691.
Fitzhugh v. *Sackett* (Mem.), 699.

PRINCIPAL AND SURETY.

1. When a principal and surety are sued together, a successful recoupment by the former will inure to the benefit of the latter, although the surety could not, if sued alone, avail himself of the defence. *Springer* v. *Dwyer.* 19

2. A sale by a creditor of collateral securities, placed in his hands by the principal debtor, in violation of a stipulation for a particular notice of sale contained in the contract under which they were pledged, does not, *per se*, discharge a surety *in toto* who is liable for the debt, but by such sale the creditor makes the securities his own to the extent of discharging the surety to an amount equal to their value. *Vose* v. *F. R. R. Co.* 869

See BILLS, NOTES, CHECKS, 9.

PRIVILEGED COMMUNICATIONS.

1. In proceedings by one C. for his discharge in bankruptcy, defendant, E., a creditor, opposed his discharge upon the ground that he was a partner in the firm of M. & Co., and had fraudulently omitted from his inventory his interest in the property of said firm. Plaintiff, a member of said firm, was called as a witness by the defendants upon the hearing before the register. Plaintiff's testimony tended to show that C. was not a member of the firm. Defendant, C., as attorney for E., filed objections to the discharge; among others, one charging the bankrupt with procuring plaintiff to testify falsely as to who were the partners in the firm, and as to the connection of the bankrupt therewith. In an action of libel,—*Held*, that the question as to whether the evidence of plaintiff was true or false was material and pertinent; that defendants were not precluded by the fact that plaintiff was called as a witness by defendant, E., from insisting that his

testimony was false; and that the publication was privileged. *Marsh v. Ellsworth.* 309

PROCESS.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY, 1.

QUESTIONS OF LAW AND FACT.

1. On the 20th of February, 1869, plaintiffs shipped by defendant's line a quantity of butter to be carried from New York to Georgetown, consigned to plaintiffs' order; the packages were unmarked. One S. presented to defendant's delivery clerk a letter written by plaintiffs to him, containing this clause: "The roll sent you today (the twentieth) you will find of very good quality," and upon this the clerk delivered the butter to S. In an action for conversion plaintiffs were nonsuited. *Held*, that, as a question of law, the letter was not a sufficient authority to justify a delivery of the butter to S.; nor was the writing of it negligence, *per se*, but it was a question of fact for the jury to determine, from the letter and the other facts of the case, whether from plaintiffs' negligence or otherwise the defendant was excused or justified in the delivery of the property. The nonsuit was therefore error. *Viner* v. *N. Y. A. G. & W. S. Co.* 23

2. The undisputed existence of a fact sometimes constitutes negligence at law; but where inferences are to be drawn, or it depends upon circumstances, it is a question of fact to be determined by a jury.

See BAILMENTS, 2.
CONTRACTS, 3.
NEGLIGENCE, 1, 2, 4.
PRINCIPAL AND AGENT, 3.
Johnson v. *De Peyster* (Mem.), 666.

RAILROAD CORPORATION.

1. The right of a railroad company to lay its tracks in a street or public highway carries with it the obligation to lay them in a proper manner, and to keep them in repair; and if an injury occurs, by reason of a neglect in either of these respects, it is liable. *Worster* v. *42d St. and G St. F. R. Co.* 203

2. No notice to it of a patent defect is necessary; but when it appears that the defect existed and an injury was caused thereby, the presumption of negligence is complete. If circumstances exist showing absence of negligence, as that the defect had not existed for a sufficient length of time to create a presumption of knowledge, or to enable it to repair, it is for the company to prove. *Id.*

See COMMON CARRIERS.

RATIFICATION.

Fitzhugh v. *Sackett* (Mem.), 699.

REAL PROPERTY.

See INFANTS, 1, 2.
TITLE.
VENDOR AND VENDEE.
WILLS, 5, 6, 7.

RECOUPMENT.

See PLEADINGS, 8.
PRINCIPAL AND SURETY, 1.

RECOVERY OF POSSESSION OF REAL PROPERTY.

See EASEMENT, 4.
USURY, 5.

REFEREE.

See COSTS, 8.
FINDINGS OF FACT AND LAW.
Morgan v. *Mulligan* (Mem.), 665.

REMEDIES.

See APPEAL, 18.
HIGHWAYS.
PRACTICE, 3.
Morgan v. *Mulligan* (Mem.), 665.
Erickson v. *Quinn* (Mem.), 697.

REMITTITUR

See JUDGMENT, 5.

REPLEVIN.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

RESCISSION.

1. Plaintiff's complaint alleged in substance that he was induced by fraudulent representations on the part of defendant to purchase and pay for certain stocks; that upon discovery of the fraud, he elected to rescind the contract, tendering back the stocks purchased, and demanded the money paid therefor, which defendant refused to pay, etc. He claimed to recover the alleged purchase-money paid. Upon the trial it appeared that plaintiff paid no money for the stocks, but only credited defendant the amount of the purchase-price upon a prior indebtedness. *Held* (PECKHAM, J., dissenting), that the rescinding the contract restored plaintiff to his original right as to the prior indebtedness and made the credit a nullity; that the credit could not be regarded for the purposes of the action as so much money paid, and thus a judgment be recovered which could be enforced by imprisonment, and that plaintiff was not entitled to recover. *Degraw* v. *Elmore*. 1

2. The rule that he who seeks to rescind an agreement upon the ground of fraud must place the other party in as good a situation as that in which he was when the agreement was made, is satisfied if the judgment asked for will accomplish that result, and in such a case no offer to return that which was received is necessary. *Allerton* v. *Allerton* (Mem.) 670

3. Accordingly, *held*, that where plaintiffs were induced by the fraudulent representations of defendant, their partner, to sell out their interest in the partnership property for a sum paid in cash, and where the complaint alleged and it appeared that defendant had received more than the amount paid out of the avails of the property, and the judgment asked for was that defendant account for the moneys received and pay over the surplus after deducting the sum paid, that it was not necessary to allege or show an offer to return the money received on the sale. *Id.*

See VENDOR AND VENDEE, 4.

ROCHESTER (CITY OF).

See CONSTITUTIONAL LAW, 11, 12, 18, 19, 20.

SATISFACTION.

See JUDGMENT, 3, 4.

SEAL.

See WILLS, 2.

SENATE.

See JUSTICES OF THE SUPREME COURT, 1.

SERVICE.

1. The service of summons by publication in an action for foreclosure under the provisions of subdivision 6 of section 135 of the Code, which provides for service upon unknown parties having interest in the mortgaged premises, is valid and bind-

ing, although it appears that the unknown party is an infant. *Wheeler* v. *Scully* (Mem.) 667

SCHENECTADY (CITY OF).

1. By the provision of the charter of the city of Schenectady, which enacts that supervisors of wards elected thereunder shall be subject to all the provisions applicable to supervisors in the towns (§ 8, chap. 385, Laws of 1862), a supervisor of a ward of that city is brought within the prohibition of the statute declaring that no supervisor of any town shall be elected or appointed to hold the office of superintendent of the poor. (Chap. 80, Laws of 1853.) By this prohibition a supervisor is not merely made ineligible to hold the office of superintendent, but he is ineligible to an election or appointment thereto. *People ex rel.* v. *Clute.* 451

2. This statutory provision does not infringe upon the constitutional rights of an elector to vote for all elective officers (§ 1, art. 2, State Constitution), nor upon his right to be elected to any office. *Id.*

SHERIFFS.

See ATTACHMENTS, 5, 6, 7, 9.
CLAIM AND DELIVERY OF PERSONAL PROPERTY.

STATUTES.

1. By the provisions of section 3 of the usury laws of this State (1 R. S., 772, § 3), the right of action of a borrower, who has paid usurious interest, for the recovery of the excess is terminated at the end of one year, and is then transferred to the officers named in section 4. (ALLEN and FOLGER, JJ., dissenting.) *Palen* v. *Johnson.* 49

2. The provisions of the Revised Statutes, authorizing the next of kin within one year after probate of a will of personal property to contest the probate (2 R. S., 61, §§ 30–39), are not confined to wills relating solely to personal property, but are applicable to those proved as wills of both real and personal property. *In re Kellum.* 298

3. These provisions are not abrogated by the provisions of the act of 1837 (chap. 460, Laws of 1837), which require the same proof and proceedings for the probate of wills of personal as of real property, and which dispense with the separate recording of the instrument as a will of personal property after it has been recorded as a will of real property. *Id.*

4. The provisions of the act of 1854 in relation to plank-roads, etc. (chap. 87, Laws of 1854), which authorize a plank-road company to surrender all or any portion of its road, and provide that in such case the portion surrendered shall cease to belong to the company, and shall revert and belong to the several towns, etc., make such surrender equivalent to an alienation by the company, and embrace as well lands which never before belonged to the towns as those which were public highways when acquired by the company, and the act cannot be assailed upon the ground that it takes the property of the grantor to the company for public use without just compensation. *Heath* v. *Barmore.* 302

5. By the Constitution of the United States the whole subject of foreign intercourse is committed to the federal government, and upon all questions relating thereto it alone can speak and act. It has the exclusive power to regulate, provide for and control the surrender of fugitives from justice from foreign countries. The provision, therefore, of the Revised Statutes (1 R. S., 164, §§ 8–11) providing for such surrender is unconstitutional, and a warrant issued by the governor in pursuance thereof is void. *People ex rel.* v. *Curtis.* 321

6. An act authorizing property to be incumbered without or against the

consent of the owner, and without resort to legal process or judicial action, is an innovation upon the common law, and will not be extended in its operation beyond the fair and reasonable import of the words used. *Mushlitt* v. *Silverman*. 360

7. An act was passed by the legislature in 1853 (chap. 80, Laws of 1853), purporting to amend "section 22 of chapter 20 of title 1 of the first part of the Revised Statutes, fourth edition." The provision incorporated and thus designated in the compilation of statutes referred to was not a part of the Revised Statutes, but was a statutory enactment existing prior to the revision and not repealed thereby. (Chap. 352, Laws of 1829.) *Held*, that the intent of the legislature was to amend that portion of the statute law which was to be found in printed form in the compilation referred to, and the act was effectual to make such amendment. *People ex rel.* v. *Clute*. 451

8. By the provision of the charter of the city of Schenectady, which enacts that supervisors of wards elected thereunder shall be subject to all the provisions applicable to supervisors in the towns (§ 8, chap. 385, Laws of 1862), a supervisor of a ward of that city is brought within the prohibition of the statute declaring that no supervisor of any town shall be elected or appointed to hold the office of superintendent of the poor. (Chap. 80, Laws of 1853.) By this prohibition a supervisor is not merely made ineligible to hold the office of superintendent, but he is ineligible to an election or appointment thereto. *Id.*

9. This statutory provision does not intringe upon the constitutional rights of an elector to vote for all elective officers (§ 1, art. 2, State Constitution), nor upon his right to be elected to any office. *Id.*

10. The provision of the act of 1867 amending the act to prevent animals from running at large upon the highways (Laws of 1867, chap. 814, § 2), which gives a remedy for injuries by cattle trespassing, applies only to cattle trespassing upon premises from the highway; it has no application to the case of a trespass by the cattle of one gaining access through a division fence to the lands of an adjoining owner. *Jones* v. *Sheldon*. 477

11. Although the title is no part of a public act, yet it is of some force in showing the purpose of the act. *Id.*

12. A special and local statute, providing for a particular case or class of cases, is not repealed, or amended as to some of its provisions, by a statute general in its terms, provisions and application, unless the intent to repeal or alter is manifest, although the terms of the general act would, but for the special law, include the cases provided for by the latter. *In re Com. of Central Park*. 493

13. Accordingly, *held*, that the provision of the act regulating the opening and laying out of streets, etc., in the city of New York, which declares that the reports of commissioners of estimate and assessment, appointed under it, when confirmed, shall be "final and conclusive" (§ 178, chap. 86, Laws of 1813; 2 R. S., 408), was not repealed or affected by the general provisions of the Code prescribing the jurisdiction of this court (Code, § 11), and that an order confirming the report of commissioners of estimate and assessment appointed in proceedings by the commissioners of the Central park under the act for the laying out and improvement of certain portions of the city of New York (chap. 697, Laws of 1867), which proceedings were governed by the act of 1813, is not appealable to this court. *Id.*

14. The grant of power to the common council of the city of New York by the "Montgomerie charter," so called (Davies' Laws of N. Y., p. 177, § 16; Valentine's Laws, 228), to make and lay out streets, etc., in said city, and the authority conferred upon the municipal corporation to direct

the pitching and paving of streets, and to assess the expense upon property benefited (Laws of 1813, chap. 86, § 175; 2 R. L., 407), gives the common council full discretion, save as curtailed or controlled by legislative action. They are the sole and exclusive judges as to the time, mode and manner of laying out, making, grading and paving streets, and also as to the material of which the streets shall be made, or with which they shall be paved. This discretion and choice being an important and valuable constituent of the power conferred, and being in the interests of the public, will not be deemed revoked by implication or doubtful inference. *In re Dugro.* 513

15. Accordingly, *held*, that the common council was not prohibited from making or paving a street in a manner or with a material not admitting of competitive bids or proposals by the provision of the "act to reorganize the local government of New York," which requires all work to be done and supplies to be furnished to be by contract, where the expenditures will exceed $1,000; and directs all contracts to be made or let, after advertisement, to the lowest bidder. (Laws of 1870, chap. 137, § 104.) *Id.*

16. It is unnecessary that a law, in order to operate as an amendment to a municipal corporation, should specify that it is an amendment to the charter or to any specific act. It is sufficient if the provisions affect the corporation in its governmental capacity. *People ex rel.* v. *Briggs.* 553

17. The words, "the city of Rochester," in the title to the act entitled "An act to amend the several acts in relation to the city of Rochester" (Laws of 1872, chap. 771), signify the corporation of the city; the title expresses a subject, and that one comprehensive enough to embrace all the details of the city charter and government. *Id.*

18. The provisions of the twentieth section of said act, which confirms the proceedings of the common council and authorizes a city railroad to lay its tracks upon the sides instead of the center of an avenue, are connected with the regulation of the streets of the city and are embraced in the subject expressed in the title, as are also the provisions of the twenty-fifth section conferring upon the water commissioners authority to contract with the trustees of the villages, through which the water to the city may be conducted, to supply the villages with water, and authorizing such trustees to levy the annual expense with their annual tax. The power to supply villages by contract is incidental to the main purpose of furnishing the city with water, and may serve as the means of attaining it; and the authority conferred upon the trustees to levy the tax is indispensable to render such a contract effectual. (CHURCH, Ch. J., ALLEN and ANDREWS, JJ., concurring.) *Id.*

19. The sections of said act, also, which are not specified as amendments in the act itself, are valid, and effectual as if thus specified. *Id.*

See ASSESSMENTS AND TAXATION, 4, 6.
BROOKLYN (CITY OF), 7.
COMMISSION, 2.
CONSTITUTIONAL LAW, 9, 11.
COURTS-MARTIAL, 2.
JURY, 1.
MANUFACTURING CORPORATIONS, 1, 2.
MECHANIC'S LIEN, 3.
NEW YORK CITY, 1, 2, 3, 5, 7, 9, 10.
WILLS, 1.
WITNESS, 1.
WRIT OF ERROR, 2.
N. E. Co. v. *McNamara* (Mem.), 653.
Bailey v. *Buell* (Mem.), 662.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STAY OF PROCEEDINGS.

See BANKRUPTCY.

STOCKBROKERS.

Defendants, stockbrokers in New York, received from one Van A., residing at Lyons, orders by telegraph to buy 2,100 shares of Erie stock, he agreeing to send margin. On the day of sending and receipt of telegrams defendants contracted for the stock ordered, to be delivered three days thereafter, at which time they were delivered to and paid for by defendants. On the day of the sending of the telegrams, but whether before or after does not appear, Van A. stole $6,500 of U. S. coupon bonds belonging to plaintiff, which he forwarded to defendants as a "margin." The bonds were received by the defendants before the delivery of and payment for the stock. In an action for the conversion of the stock,—*Held*, that defendants gave credit to the promises of Van A., and not to the bonds; that the receipt of the bonds and the fulfillment of the contract for the purchase of the stock after such receipt did not make them *bona fide* holders, and that they were therefore liable; also, that if defendants, after receipt of the bonds, purchased upon the credit thereof any stocks for Van A., they were entitled to hold them as security for any loss arising in that transaction, but the sale of bonds beyond the amount necessary for such indemnity was a conversion, for which an action would lie. *Taft* v. *Chapman*. 445

STOCKHOLDERS.

See EVIDENCE, 7.
MANUFACTURING CORPORATIONS, 2.

STREETS.

See HIGHWAYS.

SURROGATE.

See LIMITATION OF ACTIONS, 9.

SUMMONS.

An action to recover a statute penalty is not an action upon a contract within the meaning of section 129 of the Code, and the summons in such an action should be in the form prescribed by the second subdivision of that section. *McCoun* v. *N. Y. C. R. R. Co.* 176

See SERVICE.

SUPERIOR COURT OF THE CITY OF BUFFALO.

1. Upon the trial of an indictment before the Superior Court of the city of Buffalo, in case the regular panel of jurors is exhausted and it becomes necessary to summon talesmen, the court is not limited to the method prescribed by the twenty-ninth section of the act creating said court (§ 29, chap. 96, Laws of 1854, as amended by chap. 754, Laws of 1857), but it has power to order talesmen to be summoned in pursuance of the provisions of the Revised Statutes (2 R. S. 733, § 3). *Gaffney* v. *People*. 416

2. A writ of error from this court to review a conviction and judgment in a criminal case only brings up the record and matters in the nature of a record, together with the bill of exceptions, if any, settled in the case. Only legal errors appearing in the record or by exceptions taken upon the trial can be considered. This court has no power to review an irregularity complained of, not appearing by the record, but occurring out of court, and presented by affidavits attached to the record and contained in the return. *Id.*

3. Its jurisdiction is not extended in this respect in cases coming here on writs of error to the Superior Court of Buffalo, by the provisions of section 35 of the act amending the act establishing that court (§ 35, chap. 361, Laws of 1857). By the terms of that section the decisions of the General Term of that court are only to be reviewed

here "in the same cases and in the same manner as if made by the Supreme Court." *Id.*

SUPERINTENDENTS OF THE POOR.

See SCHENECTADY (CITY OF), 1.

SUPERVISORS.

See SCHENECTADY (CITY OF), 1.

SURGEON.

See MALPRACTICE.

SURROGATE'S COURT.

See FORECLOSURE, 4.
LIMITATION OF ACTIONS, 9.

TENDER.

See MORTGAGES, 4.
VENDOR AND VENDEE, 3.

TITLE.

1. The rule of the common law, that real estate held by a corporation at the time of its dissolution reverts to the grantor, does not prevail in this State in respect to stock corporations. Where lands are conveyed absolutely to a corporation having stockholders, no reversion or possibility of a reverter remains in the grantor. *Heath* v. *Barmore.* 302

2. A corporation organized under the plank-road laws of this State is authorized to take, by purchase, the entire fee of lands needed for its road, and no condition or qualification of the grant will be implied in an absolute conveyance to it in fee. The grantor retains no property therein which will prevent a division of the property among its stockholders or which will preclude the State, with the assent of the company, from diverting the land to other public uses, or from declaring by law that a surrender of any part of the road by the company shall operate to transfer the title of the company to the town in which the land is so located. *Id.*

See BILLS, NOTES, CHECKS, 2.
HUSBAND AND WIFE, 2, 4.
INFANTS, 1, 2.
VENDOR AND VENDEE, 1, 2.

TRESPASS.

The provision of the act of 1867 amending the act to prevent animals from running at large upon the highways (Laws of 1867, chap. 814, § 2), which gives a remedy for injuries by cattle trespassing, applies only to cattle trespassing upon premises from the highway; it has no application to the case of a trespass by the cattle of one gaining access through a division fence to the lands of an adjoining owner. *Jones* v. *Sheldon.* 477

TRIAL.

1. It is not indispensable that the particular circumstances relied upon to prove a fact should be contradicted in order to dispute the fact itself. If other circumstances appear in the case in antagonism with the alleged fact, it is the province of a jury to determine whether the fact is proved. *Hasman* v. *H. L. & I. Co.* 53

2. In an action upon a promissory note, tried by the court, where the defence is one not available as against a *bona fide* holder, in which position plaintiff claims to stand, after the receipt of all the evidence as to the *bona fides* of the transfer to plaintiff, and an announcement upon the part of the defendant that he has no more to offer upon that subject, if in the opinion of the court the testimony established the fact that plaintiff is a *bona fide* holder, it is not bound to receive

the evidence offered to sustain the defence, and the decision cannot be reviewed by this court, although enough was shown to have required the submission of the question thus determined to a jury, had the case been tried by a jury. *Brookman* v. *Milbank.* 378

3. Where a general objection to proof offered is sustained, error will not lie if any true ground of objection exists. But if the proof is objectionable simply upon a ground which might be obviated, if specified, and such objection is not made, but is purposely suppressed, while others not tenable are stated, the former will be deemed to have been waived, and cannot be urged to sustain the ruling upon appeal. *Height* v. *The People.* 392

4. Defendants' counsel offered proof that two of the witnesses for the prosecution had made statements in conflict with their testimony upon a material point. This was objected to by the counsel for the prosecution "as improper, immaterial and hearsay." No objection was made that the attention of the witnesses had not been called to the conversation. The evidence was excluded. *Held*, error. *Id.*

5. C.& Co. delivered to R. certain gold checks and certificates, receiving therefor R.'s check upon plaintiffs' bank, purporting to be certified by its teller. C. & Co. immediately sent a messenger with the check to plaintiffs' bank, who handed it to the teller, asking if it was all right. The teller replied that it was. The messenger immediately returned and reported this to C. & Co. The certification was in fact forged. Relying upon the declaration of the teller, C. & Co. refrained from taking such measures as might and probably would have stopped the payment of the gold checks, or a portion of them. C. & Co. deposited the check with defendant. Plaintiff brought suit to recover back the money paid thereon. Upon the trial the judge, after charging, in substance, that if C. (one of the firm of C. & Co.) had done all that could be done on his part at the time of making the declaration, and had put himself in such a position that the declaration could not affect his action, then the principle of estoppel would not apply, charged as follows: "The delivery of these gold checks on the part of Mr. C., it is insisted upon, is in law a delivery of the gold. I think it was not."

Held, that although the charge, if construed as a statement of law applicable to all cases, might be technically inaccurate, yet, as used, it simply conveyed the idea that there was not such a delivery as prevented the interception of the checks and stoppage of payment, and so considered it did not mislead the jury, and was not error. Also *held*, that plaintiff was estopped by the declaration of its teller from questioning the genuineness of the certification. *C. Nat. Bk.* v. *Nat. Bk. of C.* 575

See BAILMENT, 2.
CRIMINAL TRIAL.
DAMAGES, 4.
EVIDENCE, 1, 3, 4, 5.
MALPRACTICE, 2.

TRUSTS AND TRUSTEES.

See HUSBAND AND WIFE, 2, 3.
MANUFACTURING CORPORATIONS, 1.
PRINCIPAL AND AGENT, 6.

UNDERTAKINGS.

See INJUNCTIONS.

USAGE.

Where it has been the long continued practice of a manufacturing company to ship its goods daily by a regular line of steamboats, consigned to its agent for sale, and it has been part of the regular routine of business of the agent, without notice, to call for and receive the goods upon their arrival each day at the carrier's wharf at the place of destination, and to

remove them, a specific notice from the carrier of the arrival of each parcel is not necessary. The duty of the carrier, as such, is performed when the goods are landed at the accustomed place and the consignee has had a reasonable time to remove them. But if the goods are received upon a holiday, and it has been the usage for the consignee not to receive goods upon those days, he is entitled to a reasonable time after that day to remove them. *J. R. M. Co.* v. *N. H. S. Co.* 121

See Johnson v. *De Peyster* (Mem.), 666.

USURY.

1. By the provisions of section 3 of the usury laws of this State (1 R. S., 772, § 3), the right of action of a borrower, who has paid usurious interest for the recovery of the excess, is terminated at the end of one year, and is then transferred to the officers named in section 4. (ALLEN and FOLGER, JJ., dissenting.) *Palen* v. *Johnson.* 49

2. No privilege of immunity from the usury laws of the States is conferred upon national banks by the act of Congress of 1864 (13 Stat. at Large, 99), and a contract for a loan, made in this State, with one of these organizations, by which it reserves a greater rate of interest than seven per cent, is void. *First National Bank* v. *Lamb.* 95

3. The provision of section 30 of said act, limiting the forfeiture to the interest, has reference only to the preceding sentence, which prescribes a rate of interest in those States and Territories where no rate is fixed by law. A construction of this provision which would make it applicable to contracts made in States where the rate of interest is regulated, and which would bring it in conflict with State laws, would render it unconstitutional. *Id.*

4. The power to create a corporation as an appropriate instrument for the execution of a constitutional power vested in the federal government, only carries with it authority to confer upon that corporation such privileges or immunities from State laws as are necessary to enable it to effect the legitimate national object for which it is created. No such national object requires that national banks should exceed the rates of interest fixed by the States, and no immunity from State usury laws is, therefore, necessary. *Id.*

5. Defendant, M. M. D., was the owner of certain real estate, upon which was a mortgage in process of foreclosure. Under an arrangement with her, W. purchased the mortgage, proceeded to a sale of the premises, became the purchaser, and took title thereto. He conveyed to F., who executed to W. a bond for the amount advanced by W., secured by mortgage upon the premises. F. at the same time executed to M. M. D. a deed subject to the mortgage, with the name of the grantee in blank, with authority to her to fill the blank. W. transferred F.'s bond and mortgage to plaintiff at ten per cent discount, which was paid by defendant H. A. D., husband of M. M. D. Soon after defendants applied to plaintiff for a loan of $1,500 for four months upon security of the property, and proposed to pay $150 for the use of the money. An arrangement was made by which plaintiff's name was inserted in the deed from F., which deed was acknowledged by F. and delivered to plaintiff, who gave checks to F.'s order, but for defendant's benefit, for the $1,500. At the same time, and as part of the same transaction, plaintiff contracted to sell the premises to M. M. D. for $5,650, of which the $1,500, and the premium of $150 formed part, the sale to be consummated four months from date. Defendants remained in possession. Upon the failure of M. M. D. to perform the contract, the plaintiff brought this action to recover possession. *Held*, that the transaction was in fact a loan of money, and not a purchase of the premises by plaintiff; that the deed was in effect a mortgage;

that the transaction was usurious and the security void. *Fiedler* v. *Darrin*. 437

6. Although the intent is essential to constitute the offence of usury, the intent must be deduced from, and determined by the facts. The knowingly and voluntarily taking or reserving a greater interest or compensation for a loan than that allowed by law is *per se* usurious. The offence is not condoned by want of intent to violate the statute or by giving to the transaction another name than that of a loan. *Id.*

7. Accordingly, *held*, that evidence of plaintiff as to his intent to take more than seven per cent per annum for a loan was properly excluded. *Id.*

VENDOR AND VENDEE.

1. In an action against a vendor to recover back a payment made upon an executory contract for the sale of land, an abstract of title of the land agreed to be conveyed, furnished by him to the vendee, to aid in making a search, is competent evidence against the defendant as showing his claim of title, and this followed by proper evidence, showing that the title thus claimed is defective, makes out a *prima facie* case, putting defendant to proof of any other and better title, if any he has. *Hartley* v. *James*. 38

2. Under such a contract the vendee is not bound to accept a title resting upon adverse possession. *Id.*

3. Where the vendor's title is defective, and the vendee, upon ascertaining it, refuses to take such title, and demands the return of the payments made upon the contract, and the vendor, instead of ascertaining the objections and taking measures to cure the defects, simply holds himself ready to convey such title as he has, and requests the vendee to accept it, giving him notice that he will be held for any loss; the vendee is not called upon to make any other or further tender, or offer of payment, in order to entitle him to recover back the money paid. *Id.*

4. Where a contract for the sale of lands contains restrictions respecting the use to which the premises are to be applied by the vendee, the vendor has the right to insert in the deed tendered in performance of the contract suitable provisions either in the form of a condition or a covenant to preserve and effectuate these provisions of the contract. If he inserts them in the form of a covenant and the grantee is entitled to a change in the form, or if he has the right to elect that a condition be substituted for a covenant, it is his duty to make his election or to provide the modification required before he can rescind the contract and sue to recover back the purchase-money paid. A mere general objection and refusal to accept the deed tendered is insufficient. (CHURCH, Ch. J., and PECKHAM, J., dissenting.) *Congregation S. H. M.* v. *Halladay* (Mem.). 664

WARRANTY.

See INSURANCE (FIRE), 1.

WAIVER.

The prohibition of the Constitution of the State against compelling an accused person to be a witness against himself (Const., art. 1, § 6), may be waived by him, and is waived by his consenting to be a witness in his own behalf under the act of 1869, in relation to evidence in criminal prosecutions (chap. 678, Laws of 1869), and he thereby subjects himself to the same rules and tests applicable to other witnesses. *Connors* v. *The People*. 240

See TRIAL, 3.

WAR.

The policy of the law is to mitigate the severity of war, and to relieve citizens, as far as consistent with the interests of the government, from the hardships incident thereto. *Cohen* v *N. Y. Mut. Life Ins. Co.* 610

See INSURANCE (LIFE). PARTNERSHIP, 2.

WARRANT.

See CONSTITUTIONAL LAW, 8.

WILLS.

1. Upon an application made to the Supreme Court under the provisions of the act of 1840 (chap. 384, Laws of 1840), to prove an exemplified copy of a foreign will, an order was made adjudging that the instrument so offered was not the last will and testament of the deceased, and denying the application, which order was made upon the ground that the case was not brought within that statute. In proceedings before a surrogate for the probate of the will itself, —*Held*, that such order was no bar. *In re Diez.* 88

2. A seal is not requisite to a will of real or personal estate. *Id.*

3. An instrument which is not to have any operation until after the death of him who executes it, is a will, notwithstanding that it may have been executed in pursuance of a previous promise or obligation appearing on the face of the instrument. *Id.*

4. A mutual will, executed by husband and wife, devising reciprocally to each other, is valid. Such an instrument operates as the separate will of whichsoever dies first. *Id.*

5 The provisions of the Revised Statutes, authorizing the next of kin within one year after probate of a will of personal property to contest the probate (2 R. S., 61, §§ 30–39), are not confined to wills relating solely to personal property, but are applicable to those proved as wills of both real and personal property. *In re Kellum.* 298

6. These provisions are not abrogated by the provisions of the act of 1837 (chap. 460, Laws of 1837), which require the same proof and proceedings for the probate of wills of personal as of real property, and which dispense with the separate recording of the instrument as a will of personal property after it has been recorded as a will of real property. *Id.*

7. In case the probate of a will as a will of personal property is revoked, if it has also been proved as a will of real estate, the effect of that probate is not impaired. Notice to devisees is, therefore, unnecessary. *Id.*

8. M. by his will devised the net income arising from his real estate to his mother during her life, and upon her death directed his executor to sell all his real estate with the exception of one piece, and out of the proceeds to pay his sister J. $20,000, and the residue to his sister A. The mother died during the lifetime of the testator. The testator died, leaving plaintiff (his brother) and the two sisters his only heirs. After his death the executor received the rents of the real estate. Plaintiff claimed one-third thereof, and asked for an accounting. *Held*, that the will gave the executor no title to the real estate, or right to receive the rents and profits; but as the sale was directed to be made immediately after the death of the mother, and the direction was absolute, by this power the land was equitably converted into money, and would be so regarded, and that the entire proceeds belonged to the sisters. *Moncrief* v. *Ross.* 431

WITNESS.

The prohibition of the Constitution of the State against compelling an accused person to be a witness against himself (Const., art. 1, § 6) may be waived by him, and is waived by his consenting to be a witness in his own behalf under the act of 1869, in relation to evidence in criminal prosecutions (chap. 678, Laws of 1869), and he thereby subjects himself to the same rules and tests applicable to other witnesses. *Connors* v. *The People*. 240

See COMMISSIONS, 3.

WRIT OF ERROR.

1. A writ of error from this court to review a conviction and judgment in a criminal case only brings up the record and matters in the nature of a record, together with the bill of exceptions, if any, settled in the case. Only legal errors appearing in the record or by exceptions taken upon the trial can be considered. This court has no power to review an irregularity complained of, not appearing by the record, but occurring out of court, and presented by affidavits attached to the record and contained in the return. *Gaffney* v. *The People*. 416

2. Its jurisdiction is not extended in this respect in cases coming here on writs of error to the Superior Court of Buffalo, by the provisions of section 35 of the act amending the act establishing that court (§ 35, chap. 361, Laws of 1857). By the terms of that section the decisions of the General Term of that court are only to be reviewed here "in the same cases and in the same manner as if made by the Supreme Court." *Id.*

7265 Sm.